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No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

HUBBARD BROADCASTING, INC.,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
AND
THE UNITED STATES OF AMERICA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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November 1982

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QUESTION PRESENTED

The decision of the Federal Communications Commission, affirmed by the court of appeals, presents the following question:

Whether the United States Court of Appeals for the Eighth Circuit was correct in concluding that a petition for rulemaking, wholly independent of any application for radio facilities, is nonetheless appealable only under Section 402(b) of the Communications Act of 1934, as amended, which concerns the appeal of adjudicatory radio "licensing" proceedings, and not under Section 402(a) of that Act.

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The decision of the United States Court of Appeals for the Eighth Circuit to dismiss the subject petition for lack of jurisdiction is incorrect as a matter of law, is contrary to the decisions of this Court, conflicts with the decisions of two other cirucit courts of appeals and has created confusion as to the applicability of the appeals provisions of the Communications Act 7

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner, Hubbard Broadcasting, Inc., petitions that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit.

PARTIES TO THE PROCEEDING

In addition to Hubbard Broadcasting, Inc., the Federal Communications Commission and the United States of America, American Broadcasting Companies, Inc. and Jackson and Chaisson Broadcasting Systems, Inc. were

parties to the proceedings before the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit for which petitioner seeks a writ of certiorari is officially reported in *Hubbard Broadcasting, Inc. v. FCC*, 684 F.2d 594 (8th Cir. 1982), and is set forth herein as Appendix A. The decision dismissed an appeal from a decision of the Federal Communications Commission. *Hubbard Broadcasting, Inc.*, 87 F.C.C.2d 988 (1981). Appendix B.

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit was entered on August 6, 1982. Jurisdiction in this Court is invoked by 28 U.S.C. § 1254 (1) (1976).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

This case involves conflicting interpretations of Section 402 of the Communications Act of 1934, as amended, regarding judicial review of decisions of the Federal Communications Commission. 47 U.S.C. § 402 (1976). This statute is reproduced as Appendix D.

STATEMENT OF THE CASE

Petitioner Hubbard Broadcasting, Inc. is the licensee of of standard broadcast station KOB, Albuquerque, New Mexico, operating on AM frequency 770 kHz. KOB's operation at night is restricted by the operation of that of "clear channel" station WABC, which also operates

on 770 kHz at New York City and is licensed to American Broadcasting Companies, Inc., intervenor in the case below.

While the gravamen of this case is jurisdictional, the question of jurisdiction can only be understood in light of the procedures employed by respondent Federal Communications Commission to fix the locations, frequencies and transmitting powers of broadcast stations. Accordingly, a brief explication of the Commission's allocation processes is necessary.

This case involves the allocation of the unique, high-power, omnidirectional, so-called "clear channel" AM radio stations.[1] By virtue of their power, the protection from interference which the Commission accords them and the so-called "skywave phenomenon,"[2] these unique Class I-A, clear-channel stations are capable of providing radio service up to approximately 750 miles from their transmitters, a potential for coverage greater than any other kind of radio or television broadcast station. *See, e.g., Clear Channel Broadcasting in the AM Broadcast Band,* 78 F.C.C.2d 1345, 1366 (1980). As the United States Court of Appeals for the District of Columbia Circuit has explained, "primary" signals travel "closely along the earth's surface" with their intensity diminishing with distance but remaining "relatively constant at any location day and night from season to season." *WAIT Radio v. FCC,* 459 F.2d 1203, 1205 (D.C. Cir. 1972),

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[1] Of the more than 4,500 AM radio stations in the United States, only 25 have been selected by the FCC to be omnidirectional, clear channel stations. These are denominated by the Commission as Class I-A stations. *See* 47 C.F.R. § 73.22 (1981).

[2] Unlike FM or television stations, AM radio stations are capable of transmitting not only "groundwave" or "primary" signals but also "skywave" or "secondary" signals.

cert. denied, 409 U.S. 1027 (1972). On the other hand, "secondary" signals are caused by the so-called "skywave phenomenon," which "refers to that portion of the energy which travels upward from the transmitter into the upper atmosphere." *Id.* During the day, "because of the sun, this skywave is absorbed by the atmosphere. At night it is reflected, off layers of the upper atmosphere, back to earth, at distances much greater than the reach of the groundwave signal." *Id.* Thus, while skywave signals are less reliable, the signals are capable of providing service over large distances "when free from excessive interference on the same or adjacent channels." *Id.* (footnote omitted).

Both the FCC and its predecessor have taken advantage of this unique ability in order to provide radio service over wide, sparsely populated areas. These few stations became known early in the history of broadcasting as clear channel stations, licensed by the Commission specifically to provide that

> standard broadcast service to rural areas since channels which are primarily allocated for service to population centers (the so-called regional and local channels) must be shared by a multiplicity of stations and are, therefore, cluttered with interference—particularly at night when propagation conditions make interference problems more acute—to such an extent that each station provides satisfactory service only over relatively short distances where its signals are strong enough to override interference. Rural areas beyond these distances thus receive no service from such stations and must rely on the 10-to-50 kilowatt clear channel stations.

Federal Communications Commission, *Seventeenth Annual Report* 117 (1952).

Traditionally, AM stations have been assigned to various communities through adjudicatory proceedings in which an applicant would file an application to use a particular frequency at a particular power in a particular community. *See Logansport Broadcasting Corp. v. United States*, 210 F.2d 24, 25-26 (D.C. Cir. 1954). However, the Commission has determined to assign stations on thirteen of the clear channel frequencies by specific rule, and has, in fact, promulgated a table of assignments, similar to those employed for FM radio and television, *see id.*, for the location of clear channel frequencies. 47 C.F.R. § 73.22 (1981).[3] Among those frequencies located by rule is 770 kHz, which specifies the location of a Class I-A operation in New York City and the location of a Class II-A use in New Mexico. *Id.*

In specific recognition of the Commission position that Section 73.22(a) of its rules represented a table of assignments[4] which could be changed only by amendment or waiver, Hubbard filed the instant petition for rulemaking on March 9, 1981.[5] Appendix C. Hubbard also filed an application for Class I-A operation of the frequency 770 kHz at Albuquerque, New Mexico. A

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[3] *See, e.g.*, Hubbard Broadcasting, Inc., 44 Rad. Reg. 2d (P&F) 1005 (1978), *reconsideration denied*, 71 F.C.C.2d 591 (1979), *aff'd sub nom.*, Hubbard Broadcasting, Inc. v. FCC, Case No. 79-1549 (D.C. Cir., decided December 29, 1980).

[4] Hubbard Broadcasting, Inc., 44 Rad. Reg. 2d (P&F) at 1006.

[5] The rule amendment requested was that the frequency 770 kHz be allocated for Class I-A operation at Albuquerque instead of New York City. However, the frequency would still be available to New York City for other than Class I-A operation. Indeed, Hubbard's proposal suggested that a Class II-A station on 770 kHz be substituted in New York for the present Class I-A station. App. 19a.

request for waiver of Section 73.22(a) was included as part of that application. On June 9, 1981, the Chief of the Commission's Broadcast Bureau, acting under delegated authority, refused to institute a rulemaking proceeding and dismissed Hubbard's petition. App. 12a. Hubbard filed an application for review and on September 30, 1981, the Commission affirmed the Bureau Chief's ruling. App. 7a.

A timely petition for review was filed in the United States Court of Appeals for the Eighth Circuit. The Commission filed an untimely motion to dismiss for lack of jurisdiction, which the court dismissed without prejudice. The motion to dismiss was renewed in the brief for Respondents.[6] On August 6, 1982, the court, after full briefing and oral argument, dismissed the appeal for lack of jurisdiction. The court found that the "FCC's denial of Hubbard's 'package' of applications [*sic*] was, as a matter of substance, the exercise by FCC of its 'radio-licensing power' reviewable under Section 402(b)." App. 5a.

This petition for certiorari followed.

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[6] Notably, respondent United States of America did not join in the Commission's jurisdictional argument. *See* Brief for Respondents at 18, n.17.

REASON FOR GRANTING THE WRIT

THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT TO DISMISS THE SUBJECT PETITION FOR LACK OF JURISDICTION IS INCORRECT AS A MATTER OF LAW, IS CONTRARY TO THE DECISIONS OF THIS COURT, CONFLICTS WITH THE DECISIONS OF TWO OTHER CIRCUIT COURTS OF APPEALS AND HAS CREATED CONFUSION AS TO THE APPLICABILITY OF THE APPEALS PROVISIONS OF THE COMMUNICATIONS ACT.

Hubbard urges that the Eighth Circuit's interpretation of the appeal provision of the Communications Act is in conflict with the decisions of this Court and those of other circuits and is incorrect on its face. Moreover, the interpretation has interjected considerable confusion regarding the jurisdiction of the various courts of appeals concerning review of decisions of the Commission and raised doubts regarding the rights of those adversely affected by Commission action to seek review in their home circuits. Accordingly, Hubbard urges that this Court grant the instant petition for a writ of certiorari and review the subject decision of the United States Court of Appeals for the Eighth Circuit.

The Communications Act provides for two separate avenues for review of Commission decisions. First, Section 402(b) lists eight specific categories of appeal which must be taken to the United States Court of Appeals for the District of Columbia. 47 U.S.C. § 402(b) (1976). The second, and mutually exclusive avenue of review of Commission actions is contained in Section 402(a) of the Act which, in contra distinction to the specific listing of appealable orders under Section 402(b), concerns "[a]ny proceeding to enjoin, set aside, annul, or suspend any order of the Commission under this Act

(except those appealable under subsection (b) of this section)." 47 U.S.C. § 402(a) (1976). In essence, Section 402(a) grants the federal courts of appeals jurisdiction over actions reviewable under 28 U.S.C. § 2342 (1976), with venue "in the judicial circuit in which the petitioner resides or has its principal office, or in the United States Court of Appeals for the District of Columbia Circuit," 28 U.S.C. § 2343 (1976).

In the instant case, Hubbard sought review not of the dismissal of its application but only of the denial of its petition for rulemaking to amend the rule by assigning the frequency 770 kHz to Albuquerque for Class I-A use. However, in the Eighth Circuit's view, even though the appeal case involved only a petition for rulemaking and not an application, the case was reviewable only under Section 402(b) since "the FCC's denial of Hubbard's 'package' of applications [*sic*] was, as a matter of substance, the exercise by FCC of its 'radio-licensing power' reviewable under Section 402(b)." App. 5a.

Initially, it is submitted that the Eighth Circuit's characterization of the actions by Hubbard is simply incorrect. Hubbard did not submit a "package" of applications to the Commission. To the contrary, it is manifest that Hubbard submitted a single application (which included a request for waiver of Section 73.22) and a single petition for rulemaking. While the application with the request for waiver would have allowed Hubbard's Station KOB to construct Class I-A facilities and would have effectively allocated 770 kHz to Albuquerque for Class I-A use, Hubbard's petition for rulemaking would have merely allocated 770 kHz to Albuquerque for Class I-A use. Accordingly, while the application and petition might have been functionally equivalent in the sense that both would have worked to

assign the frequency 770 kHz to Albuquerque for Class I-A use, the petition and the application were designed to produce different results. A grant of the application and the waiver would have allowed Hubbard to operate Station KOB as a Class I-A station. In contrast, the grant of Hubbard's petition for rulemaking and the amendment of the rule as proposed therein, would not, by itself, have modified or affected the license of any specific station, including Station KOB. To obtain a Class I-A authorization, Hubbard would still have had to file and receive a grant of an application.

The lower court failed to recognize that the petition and the application were wholly independent of each other. As Hubbard explained, it filed both an application and a petition in order to allow the Commission to allocate 770 kHz to Albuquerque either through adjudication or through rulemaking. The Commission declined to allocate the frequency through either process. However, Hubbard did not appeal the denial of its waiver request and the dismissal of its application but sought review only of the order denying its petition for rulemaking.

Since the petition for rulemaking would not have affected the license of any station, the Commission's action in denying the petition simply cannot be contorted into a licensing decision. Indeed, neither the Commission nor the Eighth Circuit has been able to fit the denial of Hubbard's petition for rulemaking within any of the categories specified in Section 402(b). Accordingly, the denial of the petition is reviewable only under the residuary provisions of Section 402(a).

The principle relied upon by the Eighth Circuit is contrary to the decision of this Court in *FCC v. Columbia Broadcasting System*, 311 U.S. 132 (1940). In that

case the Court strictly construed the language of Section 402(b) and held that a Commission order refusing to consent to an assignment of a radio station license was not one of the types specifically listed in 402(b). This Court reaffirmed its strict construction of the language of Section 402(b) in *Columbia Broadcasting System v. United States*, 316 U.S. 407 (1942). In that case, the order of the Commission adopting the chain network rules was held reviewable under Section 402(a), the Court stating:

> Since the Commission's order neither grants, denies nor modifies any license, any review in advance or independently of an application for a station license must be under § 402(a), and then only if the Commission's order promulgating the regulations is an "order" within the meaning of this section. The particular label placed upon it by the Commission is not necessarily conclusive, for it is the substance of what the Commission . . . has done which is decisive.

Id. at 416.

In direct contradiction to these rulings, the Eighth Circuit has promulgated a principle that if a Commission order "bears a 'close functional similarity' to the types of cases enumerated under that section, or is 'ancillary' to, or 'in aid of,' or 'intimately associated with' the FCC licensing authority," it is reviewable only under Section 402(b). App. 4a (footnotes omitted). This practice of loosely relating almost every Commission order to that agency's licensing function cannot be harmonized with this Court's decisions. In addition, the practice is in direct conflict with the intent of Congress when it expanded the categories covered by Section 402(b) in order to attempt a more precise and comprehensive definition of the jurisdiction of the United States Court

of Appeals for the District of Columbia Circuit. S. REP. No. 44, 82nd Cong., 1st Sess. 11 (1951). The result has been that the "confusion and controversy"[7] existing before the adoption of the 1952 amendments to the Communications Act of 1934 has not been eliminated, as Congress hoped, but has continued and expanded.

In addition, the Eighth Circuit's decision is in direct conflict with the decision of the United States Court of Appeals for the Seventh Circuit in *Campos v. FCC*, 650 F.2d 890 (7th Cir. 1981). There, the Seventh Circuit accepted jurisdiction over a case involving the denial by the Commission of an application for a radio operator license. In denying the Commission's argument that the denial of the application was appealable only under Section 402(b), the court stated:

> The first seven categories listed in Section 402(b) cover orders relating to the granting, denial, modification and revocation of construction permits and station licenses. The last category covers orders suspending operator licenses. The petition here is for review of orders denying applications for operator licenses. Thus, as the Commission concedes, the order in issue "is not precisely described by any of the categories of appeals provided for in Section 402(b)". . . . The Commision argues that the order is nevertheless within the ambit of Section 402(b) because it is a licensing decision functionally similar to those specifically listed. However, it is well settled that Section 402(b) is to be narrowly construed and confined to the enumerated categories. . . . Plainly, had Congress intended that all licensing decisions be reviewable pursuant to Section 402(b), there would have been no point in listing the eight specific categories provided for in that Section.

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[7] S. REP. NO. 44, 82d Cong., 1st Sess. 11 (1951).

650 F.2d at 892-893. Since a petition for rulemaking is not one of the categories enumerated in Section 402(b), the Seventh Circuit's reasoning would require that its denial be reviewable only under the provisions of Section 402(a). Thus, the principles of law adopted by the two circuits are in direct conflict.

The Commission's decision is likewise directly inconsistent with that of the United States Court of Appeals for the Third Circuit in *New Jersey Coalition for Fair Broadcasting v. FCC*, 574 F.2d 1119 (3d Cir. 1978). There a citizens group filed a petition for rulemaking seeking to amend the Commission's table of television allocations to assign a new VHF television channel to a city in New Jersey or to reassign a New York City or Philadelphia channel to a city in New Jersey.[8] Thus, as in the instant case, the Commission refused a rulemaking request that a frequency be reassigned from one city to another. Yet, without question, the Third Circuit found that it had jurisdiction over the appeal pursuant to Section 402(a).

As in 1940, a question of importance has been raised touching on the distribution of judicial authority under Section 402 of the Communications Act of 1934, as amended.[9] Confusion as to which court would have jurisdiction in a particular case is widespread among

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[8] The Eighth Circuit is incorrect in asserting that the Commission in *New Jersey Coalition* merely "terminated an inquiry into the adequacy of television service in the State of New Jersey." It is clear that the Commission also rejected a request for assignment of frequencies from either New York City or Philadelphia. New Jersey Coalition for Fair Broadcasting v. Federal Communications Commission, 574 F.2d 1119, 1122 (3d Cir. 1978).

[9] *See* FCC v. Columbia Broadcasting System, 311 U.S. 132, 133 (1940).

different agencies of the government, the courts of appeals, and litigants themselves. The result is that in many cases the appealing party must go to the District of Columbia Circuit and seek review under both Sections 402(a) and 402(b) in order to avoid the risk of dismissal.[10] As a consequence, the District of Columbia Circuit is overburdened with administrative appeals and many citizens are deprived of their right to litigate cases involving important communications matters in the jurisdiction of their choice.

In 1952, Congress sought to eliminate the confusion in this very important judicial matter, but clearly it failed. The above-cited conflict among the various circuit courts has aggravated this problem just as has the disagreement between the Department of Justice and the Federal Communications Commission in the instant case. The Commission, itself, has been unable to agree with the circuit courts in various cases.[11] Clearly, this is an important matter affecting a substantial number of American citizens, which should be resolved by the Court.

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[10] *See, e.g.*, Columbia Broadcasting System v. FCC, 211 F.2d 644 (D.C. Cir. 1954), *cert. denied*, 348 U.S. 876 (1954); Kessler v. FCC, 326 F.2d 673 (D.C. Cir. 1963); Metropolitan Television Company v. United States, 221 F.2d 879 (D.C. Cir. 1955).

[11] *See, e.g.*, Campos v. FCC, 650 F.2d 890 (7th Cir. 1981), where Commission's contention that appeal was properly under 402(a) was overruled; Tomah-Mauston Broadcasting Co. v. FCC, 306 F.2d 811 (D.C. Cir. 1962), where Commission's argument that appeal was under 402(a) was denied.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 81-2295

Hubbard Broadcasting, Inc.,
Petitioner,

v.

Federal Communications Commission and The United States of America,
Respondents,

Jackson and Chaisson Broadcasting Systems, Inc. and American Broadcasting Companies, Inc.,
Intervenors.

ON PETITION FOR REVIEW OF AN ORDER OF THE FEDERAL COMMUNICATIONS COMMISSION

Submitted: June 15, 1982
Filed: August 6, 1982

Before *Heaney*, Circuit Judge, *Miller*,* Judge, and *Collinson*,** Senior District Judge.

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* The Honorable Jack R. Miller, Judge, United States Court of Customs and Patent Appeals, sitting by designation.

** The Honorable William R. Collinson, Senior District Judge, United States District Court for the Eastern and Western Districts of Missouri, sitting by designation.

MILLER, Judge.

Petitioner Hubbard Broadcasting, Inc. ("Hubbard") seeks review under 47 U.S.C. § 402(a) of the decision and order of respondent Federal Communications Commission ("FCC") upholding dismissal on June 9, 1981, by FCC's Broadcast Bureau of Hubbard's rulemaking petition to amend FCC's rule (47 C.F.R. § 73.22 (1981)) to provide for a Class I-A "clear channel" station (KOB) at Albuquerque, New Mexico, on the AM radio frequency 770 kiloHertz ("kHz").

The FCC order not only denied Hubbard's application for review of the Broadcast Bureau's dismissal of its rulemaking petition, but also denied: (1) Hubbard's application for review of the Bureau's denial of Hubbard's related request for waiver of section 73.22 of FCC's rule (Table of Assignments) to permit Class I-A operation for Station KOB; and (2) Hubbard's application for review of the Bureau's dismissal of its application for modification of its outstanding construction permit (granted November 2, 1976) to specify nondirectional nighttime operation for Station KOB, which would be expected to follow upon favorable action on either Hubbard's petition for rulemaking or its request for waiver.[1]

The threshold issue is whether this court has jurisdiction over this appeal in view of the exception contained in 47 U.S.C. § 402(a), which provides:

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[1] It should be noted that in March of 1981 Hubbard filed a package of "inextricably intertwined" applications (FCC's description) comprising its petition for rulemaking, it application for waiver of section 73.22 of FCC's rules, and its application for modification of Hubbard's construction permit to change the facilities of KOB to accommodate a Class I-A assignment.

> Any proceeding to enjoin, set aside, annul, or suspend any order of the Commission under this chapter (except those appealable under subsection (b) of this section) shall be brought as provided by and in the manner prescribed in [28 U.S.C. § 2342 et seq.[2]].

47 U.S.C. § 402(b) provides, *inter alia*:

> Appeals may be taken from decisions and orders of the Commission to the United States Court of Appeals for the District of Columbia in any of the following cases:
>
> (1) By any applicant for a construction permit or station license, whose application is denied by the Commission.
>
> (2) By any applicant for the . . . modification of any such instrument of authorization whose application is denied by the Commission.
>
> . . . .

The facilities and status sought by Hubbard would require modification of the operation of American Broadcasting Company's Radio Station WABC (New York City) from Class I-A status, assigned to WABC by 47 C.F.R. § 73.22, to Class II-A. In dismissing Hubbard's rulemaking petition and application, the Broadcast Bureau pointed out that "[e]fforts to reclassify both KOB and WABC as directionalized Class I-B stations on 770 kHz were twice rejected by the Court of Appeals for

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[2] 28 U.S.C. § 2342 provides that the court of appeals has exclusive jurisdiction to enjoin, set aside, suspend, or to determine the validity of all final reviewable orders of the FCC. 28 U.S.C. § 2343 provides that "[t]he venue of a proceeding under this chapter is in the judicial circuit in which the petitioner resides or has its principal office, or in the United States Court of Appeals for the District of Columbia Circuit." Hubbard's principal office is in St. Paul, Minnesota.

the District of Columbia Circuit,[3] on the grounds that disparate treatment of the three network flagship stations [WNBC, WCBS, and WABC], entailed by directionalizing WABC, could not be justified."

In 1952, Congress amended section 402 to "make clear that judicial review of all cases involving the exercise of the Commission's radio-licensing power is limited to the United States Court of Appeals for the District of Columbia." S. Rep. No. 44, 82d Cong., 1st Sess. 11 (1951); *see* H.R. Rep. No. 1750, 82d Cong., 2d Sess. 2-3, 16 (1952). In accordance with this stated purpose, the courts generally have required that appeals be taken under section 402(b) where the Commission's action bears a "close functional similarity" to the types of cases enumerated under that section,[4] or is "ancillary" to,[5] or "in aid of,"[6] or "intimately associated with"[7] the FCC licensing authority.

Hubbard cites *Campos v. FCC*, 650 F.2d 890, 893 (7th Cir. 1981), for its statement that "it is well settled that Section 402(b) is to be narrowly construed and confined to the enumerated categories," citing *FCC v.*

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[3] *Hubbard Broadcasting, Inc. v. FCC*, 564 F.2d 600 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 968 (1978); *Hubbard Broadcasting, Inc. v. FCC*, 663 F.2d 220, 223 (D.C. Cir. 1980).

[4] *Metropolitan Television Co. v. United States*, 221 F.2d 879, 880 (D.C. Cir. 1955). *See Kessler v. FCC*, 326 F.2d 673 (D.C. Cir. 1963).

[5] *Tomah-Mauston Broadcasting Co. v. FCC*, 306 F.2d 811, 812 (D.C. Cir. 1962); *Helena TV, Inc. v. FCC*, 269 F.2d 30 (9th Cir. 1959).

[6] *Cook, Inc. v. United States*, 394 F.2d 84, 87 (7th Cir. 1968).

[7] *WHDH, Inc. v. United States*, 457 F.2d 559, 561 (1st Cir. 1972).

Columbia Broadcasting System, 311 U.S. 132 (1940). However, the quoted statement is dictum, and the cited case merely calls for a "clear-eyed" reading of section 402(b). Moreover, the Seventh Circuit panel appears to have overlooked the later case of *Columbia Broadcasting System, Inc. v. United States*, 316 U.S. 407, 416 (1942), wherein, consistent with the Congressional purpose, the court said that, in determining whether an FCC order is appealable under section 402(a) or section 402(b), "it is the substance of what the Commission . . . has done which is decisive."

Hubbard also cites *New Jersey Coalition for Fair Broadcasting v. FCC*, 574 F.2d 1119, 1121 (3d Cir. 1978), wherein the court held that it had jurisdiction under section 402(a) to review the results of an informal rulemaking proceeding in which FCC terminated an inquiry into the adequacy of television service in the State of New Jersey. This, of course, is unlike the case before us.

In view of the foregoing, and after considering all arguments of the parties and intervenor American Broadcasting Companies, Inc., we are persuaded that FCC's denial of Hubbard's "package" of applications was, as a matter of substance, the exercise by FCC of its "radio-licensing power" reviewable under section 402(b); further, that to permit Hubbard to split off a part of the "package" in a transparent attempt to obtain jurisdiction in a forum other than the Court of Appeals for the District of Columbia, which has twice ruled against reclassifying KOB and WABC as directionalized stations on 770 kHz, would frustrate the clear intent of Congress that judicial review of all cases involving FCC's "radio-licensing power" be limited to the United States Court of Appeals for the District of Columbia.

Accordingly, we hold that this court does not have jurisdiction over this appeal.

The appeal is, therefore, dismissed.

A true copy.

Attest:

Clerk, U.S. Court of Appeals,
Eighth Circuit.

APPENDIX B

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

File No. BMP-810309AG

In the Matter of

Amendment of § 73.22, Table of Assignments, AM Broadcast Stations, to "Assign" the frequency 770 kilohertz to Albuquerque, New Mexico, for Class I-A operation

and

Application of Hubbard Broadcasting, Inc. for Modification of AM Broadcast Station KOB, Albuquerque, New Mexico

MEMORANDUM OPINION AND ORDER

(Adopted: September 30, 1981; Released: October 5, 1981)

BY THE COMMISSION: COMMISSIONERS QUELLO AND WASHBURN CONCURRING IN THE RESULT; COMMISSIONER RIVERA DISSENTING.

1. Before the Commission are two applications for review filed by Hubbard Broadcasting, Inc. ("Hubbard"), licensee of Class II-A AM Station KOB, Albuquerque, New Mexico. Because they both relate to the same issue, they are considered together herein. Also under consideration are a pleading filed by American Broadcasting Companies, Inc. ("ABC"), licensee of Class I-A AM

Station WABC, New York, New York, in opposition to the applications for review, and Hubbard's reply to this opposition.

2. Briefly, the events leading up to the present applications are as follows. On March 9, 1981, Hubbard filed a petition for rule making asking that § 73.22(a) of the Commission's rules be amended to reflect a Class I-A assignment on 770 kHz in New Mexico and a co-channel Class II-A assignment in New York, New York.[1] Hubbard also filed an application for Station KOB to operate as a Class I-A facility on 770 kHz at the same time. Accompanying the application was a request for waiver of § 73.22(a).[2] Both the application and petition for rule making were dismissed by letters from the Chief of the Broadcast Bureau, on June 9, 1981. Copies of these letters are attached hereto as Appendices A and B. Hubbard now applies for Commission review of the Bureau actions. ABC argues that Hubbard has raised insufficient grounds for review and that dismissal of the

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[1] The present rule reflects a Class I-A station on 770 kHz in New York and a co-channel Class II-A assignment in New Mexico. A Class I-A station is an omnidirectional, unlimited-time 50 kW facility operating on a clear channel. A Class II-A station is a 50 kW, unlimited-time AM station on a clear channel that receives interference from the dominant Class I stations and may be required to directionalize to avoid interference to Class I stations.

[2] *See*, § 73.21 of the Commission's Rules. Because Hubbard seeks an amendment to § 73.22(a) that would only apply to Station KOB, we agree with the Bureau's letter, and ABC's opposition to the applications for review, that the request for waiver of § 73.22(a) and the petition for amendment to § 73.22(a) are functionally equivalent. We therefore regard the applications for review as complaining of one action and treat them accordingly herein.

petition and application was procedurally and substantively correct.

3. In essence, Hubbard seeks Class I-A status for Station KOB, its latest campaign in a controversy that has been before the Commission and the courts for the past 40 years. Currently, KOB is a Class II-A station, required to directionalize its signal to protect the service area of Class I-A Station WABC. Since 1941, when international agreement required the removal of KOB's operation to 770 kHz, it has sought omnidirectional operation on that frequency. As we said in the *Further Notice of Proposed Rule Making* in the recently concluded clear channel proceeding: "No other station assignment among the thousands so far established has approached this one in the length, complexity and thoroughness that has been accorded in adjudicatory and rule making proceedings before the Commission and in repeated judicial reviews." 70 F.C.C.2d 1077, 1107 (1978). A complete inventory of the various proceedings addressing the KOB issue would be unnecessarily repetitive as well as confusing. What follows is a brief example of the detail with which this dilemma has been considered.

4. In 1944, the Commission instituted a proceeding, concluded in 1958, that established a Class I-B, directionalized sharing of 770 kHz by WABC and KOB. The Court of Appeals for the District of Columbia, in *American Broadcasting-Paramount Theatres, Inc. v. FCC*, 280 F.2d 631 (D.C. Cir. 1960), directed the Commission to look into the disparity in treatment of the network flagship radio stations (WNBC and WCBS remaining Class I-A, while WABC would be required to directionalize as a Class I-B facility) resulting from the Class I-B allocation to KOB. In 1963, the Commission announced its

determination that the disparity was justified by the relevant considerations and maintained the Class I-B pairing on 770 kHz. 35 F.C.C. 36 (1963). The Court again objected, in *American Broadcasting-Paramount Theatres v. FCC*, 345 F.2d 954 (1965), returning the issue of equalization of treatment of the network flagship stations to the Commission for further proceedings. In 1976, concluding a 1969 rule making in which all possible alternatives were considered, the Commission found it in the public interest to specify the present allocation scheme, that is, Class I-A operation in New York and Class II-A operation in New Mexico on 770 kHz. 59 F.C.C.2d 32 (1976). This result was affirmed *per curiam* without opinion by the Court. *Hubbard Broadcasting v. FCC* (Case No. 76-1476) (D.C. Cir. 1977), *cert. denied*, 98 S. Ct. 1605 (1978).

5. Hubbard sought consideration of the issue again in Docket 20642, the clear channel rule making. In the *Further Notice, supra*, the Commission generally rejected the I-B pairing concept, stating that:

> . . . the gains achieved at the cost of dislocating longstanding service by the Class I-A stations would generally fail to achieve today's goal of service from radio stations able to orient broadcasts to the needs of persons living relatively nearby. (70 F.C.C.2d, at 1079)

As recently as 1980, the D.C. Circuit affirmed the Commission's dismissal of a Class I-A application for KOB. *Hubbard Broadcasting v. FCC* (Case No. 79-1549) (D.C. Circuit 1980). The present developments appear to belie the Court's conclusion that:

> . . . this forty year old controversy is finally brought to an end.

6. Hubbard's principal contention on review is that the Bureau erred in rejecting Hubbard's argument that current demographic trends would justify yet another examination of whether KOB should be permitted omni-directional operation. We concur with the Bureau Chief's response that recent population shifts from the northeast to the southwest indeed have been considered in recent AM allocation proceedings. Although Hubbard disputes it, our policy favoring additional local and primary service as opposed to secondary service, in concert with our awareness of current population patterns, influenced our decision to provide for additional duplication of the clear channels. *See, Clear Channel Broadcasting in the AM Broadcast Band, Further Notice of Proposed Rule Making, supra*; and *Report and Order*, 78 F.C.C.2d 1345 (1980); *also see, Goodwill Stations, Inc. v. FCC*, 325 F.2d 637 (D.C. Cir. 1963). We are mindful of the white area coverage that Hubbard claims its proposal would provide; however, we believe that among the various means of facilitating white area coverage (including Class C FM stations) Hubbard's proposal is not necessarily the most desirable, in light of the other AM reallocations it would entail. It is well established that the Commission has broad discretion in fashioning allocation schemes in the public interest, particularly where there exist mutually exclusive demands for scarce spectrum. *See, Coastal Bend Television Co. v. FCC*, 234 F.2d 686, 690 (D.C. Circuit 1956). We find no need to further discuss the merits of Hubbard's arguments in favor of acceptance of the rule making petition, because we concur with the Bureau Chief's letter dismissing the petition. *See*, Appendix A.

7. As a procedural matter, we disagree with Hubbard's contention that the Bureau Chief did not possess the

authority to dismiss the rule making petition. The petition was dismissed as moot, repetitive and not warranting consideration by the Commission under § 1.401(e) of the Commission's Rules; it was not accepted under § 1.403. Section 0.281(b)(6) instructs the Bureau Chief to refer to the Commission "... petitions for rule making *which have been accepted under Section 1.403* . . ." (emphasis supplied). We agree with ABC that the Bureau Chief acted within his authority and correctly in dismissing the subject petition for rule making.

8. Accordingly, pursuant to authority contained in § 303 of the Communications Act of 1934, as amended, and § 1.115 of the Commission's Rules, IT IS ORDERED, That the Applications for Review of Hubbard Broadcasting, Inc. ARE DENIED.

9. For further information, contact Molly Pauker, Broadcast Bureau, (202) 632-7792.

FEDERAL COMMUNICATIONS COMMISSION,

William J. Tricarico, *Secretary.*

Appendix A

FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

June 9, 1981

In Reply Refer To:
8610

Frank U. Fletcher, Esquire
Fletcher, Heald & Hildreth
1225 Connecticut Avenue, N.W., Suite 400
Washington, D.C. 20036

Dear Mr. Fletcher:

This is in reference to the petition for rule making filed by your office on behalf of Hubbard Broadcasting, Inc.,

licensee of Station KOB, Albuquerque, New Mexico. You seek amendment of Section 73.22 of the Commission's Rules, to permit Class I-A operation for Station KOB. Currently, Section 73.22 provides for a Class I-A station in New York, New York, and a co-channel Class II-A station in New Mexico. Class II-A stations are required to directionalize to protect specified contours of co-channel Class I-A stations. The proposed change also would entail modifying the operation of Station WABC, New York, New York, from Class I-A to Class II-A, as both KOB and WABC operate on 770 kHz. Alternatives, including the feasibility of removing KOB to another channel, were explored and rejected as impossible in Docket No. 6741, *Clear Channel Broadcasting*, 59 F.C.C. 2d 32 (1976). Accordingly, it is evident that in no manner may both Stations KOB and WABC be operated as omnidirectional Class I-A stations.

Your principal argument in favor of Class I-A status for KOB is that recent population growth in the Southwestern United States, as well as concomitant population decline in the Northeast, and particularly New York, would justify reallocation of operations on Channel 770, under Section 307(b) of the Communications Act of 1934, as amended. The Commission has recognized the demographic trend that has resulted in increased population in the Southwest. Indeed, the 1961 duplication on the Class I-A channels and authorization of Class II-A assignments thereon had the effect of accommodating the growth pattern. See *Clear Channel Broadcasting*, 31 F.C.C. 656 (1962). Moreover, the recent decision in Docket No. 20642, *Clear Channel Broadcasting*, 78 F.C.C.2d 1345 (1980), permits further duplication on the Class I-A channels, and that decision thereby facilitates additional primary service in the Southwest.

In this regard, data submitted with your request indicates that the principal service gain from modification of KOB's status from II-A to I-A would be secondary service. However, provisions of secondary skywave service is not a primary objective of the Commission's current AM allocations policy. *Clear Channel Broadcasting*, 78 F.C.C.2d 1345 (1980). Additionally, the new primary service Class I-A operation by KOB would provide would not offset the loss of primary service by WABC caused by its modification to Class II-A status.

Finally, the initial modification of KOB's original omnidirectional Class I status on Channel 1180 under the North American Regional Broadcasting Agreement was beyond the Commission's control and gives rise to no entitlement that KOB be restored to its original position. In protracted proceedings over the last four decades, the Commission has attempted to find a solution to the controversy between KOB and WABC that satisfies both parties, as well as best serves the public interest. Efforts to reclassify both KOB and WABC as directionalized Class I-B stations on 770 kHz were twice rejected by the Court of Appeals for the District of Columbia Circuit, on the grounds that disparate treatment of the three network flagship stations, entailed by directionalizing WABC, could not be justified.

I believe your petition somewhat mischaracterizes the Commission's interpretation of the Court of Appeals pronouncements in this matter. We agree that the rulings that Station WABC should not be treated differently from the other two network flagship stations does not necessarily control our present review of Station KOB's status. However, we cannot disregard the Court's previous decisions in our present deliberations.

We could grant the relief you seek without directionalizing the other two network flagship stations in New York City, to maintain parity with WABC. As we decided in Docket No. 6741, the service loss entailed by directionalizing all three network flagship stations cannot be offset by making KOB omnidirectional. The Bureau finds in your petition no new grounds that persuade us to alter the conclusions the Commission reached on these issues in 1976.

For the above reasons, the Broadcast Bureau is dismissing without prejudice your petition for rule making on behalf of Hubbard Broadcasting, Inc. pursuant to Sections 0.281(b)(6) and 1.401(e) of the Commission's Rules. I note that we have not taken into account in our deliberations the responsive pleadings filed by Jackson and Chaisson Broadcasting Systems, Inc., and ABC, or your Replies, because we have not formally accepted your petition.

Please be advised that you may seek reconsideration of this action pursuant to Section 1.429 of the Commission's Rules by filing an appropriate petition within thirty (30) days from the date of this letter.

Sincerely,

Richard J. Shiben
Chief, Broadcast Bureau

Appendix B

FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In Reply Refer To:
8910-AGM

Hubbard Broadcasting, Inc.
77 Broadcast Plaza
Albuquerque, New Mexico 87103

In re: Hubbard Broadcasting, Inc.
KOB, Albuquerque, New Mexico
BMP-810309AG

Gentlemen:

This concerns (1) your above-referenced application to modify an outstanding construction permit (BP-20,935, as modified, granted November 2, 1978) to specify non-directional nighttime operation, and (2) your related request for waiver of Section 73.22 of the Commission's Rules to permit Class I-A status for station KOB. As with your concurrent petition for rule making, the facilities and status you seek by rule waiver would entail modifying the operation of station WABC, New York, New York, from Class I-A to Class II-A.

The waiver would of course represent a de facto amendment of Sections 73.22, and sufficient grounds for such a waiver would be essentially identical to those for a formal rule amendment. If anything, waiver would require an even more compelling showing, since it would not have the public-participation procedures of a rule making proceeding.

By separate correspondence, your petition for rule making is being dismissed. Your request for waiver of Section 73.22 contains no compelling arguments not

set out in your petition, and it must also be denied. Consequently, your application for non-directional nighttime operation is dismissed for violation of Sections 73.22 and 73.182 of the Commission's Rules.

Sincerely,

Richard J. Shiben
Chief, Broadcast Bureau

cc:

American Broadcasting Companies, Inc.
Peter V. Gureckis & Associates
Ralph J. Bitzer
Jackson & Chaisson Broadcasting System, Inc.
Faye & Richard Tuck, Inc.
Eugene T. Smith
Robert Jones
Century Broadcasting Corporation
Fred W. Volken
Kirkland & Ellis
Dontron, Inc.
Miller & Fields
Edward F. Lorentz & Associates
Plano Broadcasting Corporation
Cole, Raywid & Brauerman
Latin American Broadcasting Co.
Robert L. Purcell
Cohn and Marks
E. Harold Munn, Jr.
KXA, Inc.
Haley, Bader & Potts
Hatfield & Dawson
Bluebonnet Radio Broadcasters, Inc.
Smith & Pepper

APPENDIX C
(Attachments Omitted)

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

RM-

In re

Amendment of Section 73.22 Table of Assignments, Standard Broadcast Stations, to "Assign the Frequency 770 Kilohertz to Albuquerque, New Mexico, for Class I-A Operation.

Directed to: **The Commission**

PETITION FOR RULEMAKING

Hubbard Broadcasting, Inc., licensee of standard broadcast station KOB, Albuquerque, New Mexico, respectfully requests that the Commission's AM "Table of Assignments"[1] be amended as follows:

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[1] To petitioner's knowledge, the instant petition is the first petition for "AM rulemaking" presented to the Commission. Petitioner has endeavored to comply with the Commission's rules for FM and TV rulemaking since there appear to be no specific rules concerning "AM rulemaking." For example, a copy of this petition will be served on ABC even though the Commission's rules require this only in cases of "[p]etitions for amendment of the FM . . . or the Television Table[s] of Assignments." 47 C.F.R. § 1.401(d).

§ 73.22 Assignment of Class II-A stations.

(a) Table of assignments. One Class II-A station may be assigned on each channel listed in the following table within the designated State or States:

Channel (Kilohertz)	*Location of existing class I station*	*State(s) in which class II-A assignment may be applied for*
	* * *	
770	Albuquerque, N.M.	New York
	* * *	

In support, the following is submitted:

1. Petitioner seeks "reassignment" of 770 kHz to Albuquerque, New Mexico for Class I-A operation.[2] Amendment or waiver[3] of Section 73.22 is necessary

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[2] Class I-A stations are generally those which operate with 50 kw nondirectionally and, thus, are "designed to render primary and secondary [or skywave] service over an extended area and at relatively long distances." 47 C.F.R. § 73.21(a)(1) (1979). Class I-B stations also render primary and wide-area secondary service; however, since I-B stations are directionalized and are not protected from interference to the extent that I-A stations are, I-B's offer more limited secondary service. As the Commission has recognized, of the more than 4,500 radio stations in the country, only those few I-A and I-B stations can provide wide-area secondary service since they are the only stations which "receive protection which enables them to render nighttime skywave service" beyond their primary service areas. *Clear Channel Broadcasting in the Standard Broadcast Band*, ___ F.C.C.2d ___, 48 P & F Radio Reg. 2d 1077, 1105 (1980) [hereinafter *1980 Clear Channel Report and Order*].

[3] Hubbard is filing simultaneously with this petition an application and request for waiver which also seeks allocation of 770 kHz for Class I-A operation at Albuquerque, New Mexico. The application has proven necessary because of the application of Jackson and Chaisson Broadcasting, Inc., for a Class II-A facility on 770 kHz at Lafayette, Louisiana. If accepted, the Hubbard I-A application would also be mutually exclusive with the application of the American Broadcasting Companies, Inc., for renewal of license of station WABC, New York City, New York.

since the Commission contends that Section 73.22, in a clear departure from the traditional system of AM allocations, "assigns" the frequency 770 kHz to New York City for Class I-A operation. *Hubbard Broadcasting, Inc.*, ___ F.C.C.2d ___, 44 P&F Radio Reg. 2d 1005 (1979), *reconsideration denied*, 45 P&F Radio Reg. 2d 780 (1980).

2. The United States Court of Appeals for the District of Columbia Circuit recently agreed, *Hubbard Broadcasting, Inc. v. Federal Communications Commission*, ___ F.2d ___ (Case No. 79-1549, decided December 29, 1980), and, thus, upheld the Commission's dismissal of a Class I-A application filed by Hubbard in 1978, which specified I-A operation in Albuquerque, since the "station allocation . . . made [by Section 73.22] should be maintained until a waiver is granted or until the rule is amended." *Sl. Op.* at 7 (footnote omitted). In accordance with this decision, and in view of the changed circumstances detailed herein, Hubbard now requests "reassignment" of 770 kHz.

I. Background

3. As the Commission is well aware, the controversy over the use of 770 kHz has continued off and on for nearly 40 years. In 1941 both KOB[4] and WABC[5] were

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[4] KOB was first licensed in 1922 by the Department of Commerce. In 1928 the Federal Radio Commission assigned KOB the frequency 1180 kHz with 10 kw of power. In 1940 the Commission authorized KOB to increase power to 50 kw and designated KOB a Class I station, the only facility licensed to operate at night on 1180 kHz. *American Broadcasting Co. v. Federal Communications Commission*, 191 F.2d 492 (D.C. Cir. 1951).

[5] WABC, then known as WJZ, appears to have been originally licensed to Boundbrook, New Jersey, on 660 kHz with 30 kw

[footnote continued]

displaced from their operating frequencies as a result of the North American Regional Broadcasting Agreement. 55 Stat. 1005 (1937). The Commission moved WABC to 770 kHz, *Federal Communications Commission, Sixth Annual Report* 45 (1940), and after some experimentation on another frequency, the Commission on its own motion also moved KOB to 770 kHz "temporarily," *American Broadcasting Co. v. Federal Communications Commission*, 191 F.2d at 495.

4. This mutual displacement gave rise to several decades of controversy over the use of the frequency, which itself became enmeshed in a general Commission inquiry concerning the status of all clear channel stations. At the end of its lengthy general inquiry, the Commission decided in 1961 that the public interest, and in particular the interests of the largely underserved Southwest, would be best served by the so-called "duplication" of 13 of the 25 clear channel frequencies. *Clear Channel Broadcasting in the Standard Broadcast Band*, 31 F.C.C. 656 (1961) [hereinafter *1961 Report and Order*].

5. In effect, this meant that the 13 clear channel stations would no longer have exclusive high-power use of the frequencies at night, but, rather, that the 13 clear channels would be "cleared for licensing of a subordinate

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of power. *Federal Radio Commission, Second Annual Report* 58, 92 (1928). In 1928, the Federal Radio Commission moved the station to 760 kHz, *id.*, at 184, 102, where it remained until displaced by the North American Regional Broadcasting Agreement. WABC is now licensed to the American Broadcasting Companies, Inc., which also operates four national radio networks with hundreds more affiliates than either the National Broadcasting Companies, Inc. or CBS, Inc., which operate only one network each. See *Proposal of American Broadcasting Companies, Inc. to Establish Four New Specialized "American Radio Networks,"* 11 F.C.C.2d 163 (1967).

broadcaster at night." *WAIT Radio v. Federal Communications Commission*, 459 F.2d at 1205. The duplication would be accomplished, the Commission decided, with the licensing of so-called Class II-A stations to operate at night on the selected frequencies at locations sufficiently distant and at powers low enough so that the Class II-A stations would not interefere with the dominant Class I facilities on their frequencies, and the Commission adopted specific licensing procedures for accomplishing the duplication. *1961 Report and Order* at 578-79.

6. The status of 770 kHz was specifically unaffected by the *1961 Report and Order*, 31 F.C.C. at 593-97, and the Commission instituted yet another parallel proceeding to decide the status of the frequency. In 1963, the Commission reached the same conclusion it had in 1958 regarding the use of 770 kHz: that the public interest would best be served by allowing KOB and WABC to operate as Class I-B stations, each protecting the signal of the other. The Commission reasoned in accordance with the fundamental requirements of Section 307(b) of the Communications Act,[6] that the "gain of KOB's primary and secondary service to be realized in unserved and underserved areas would more than offset the losses of WABC in terms of the overall public interest." *Hubbard Broadcasting, Inc.*, 35 F.C.C. 36, 40 (1963).

7. On appeal, however, the United States Court of Appeals reversed the Commission's determination. *American Broadcasting-Paramount Theatres, Inc. v. Federal Communications Commission*, 345 F.2d 954

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[6] 47 U.S.C. § 307(b) (1970) [hereinafter Section 307(b)]. *See infra* at 6-7.

(D.C. Cir. 1965). The court found that WABC should be given "equitable" channel treatment vis-a-vis the "flagship" stations of the NBC and CBS networks, 345 F.2d at 960, and suggested that the Commission re-evaluate its conclusions concerning the service needs of the Southwest in light of then-new services as well as "other changed conditions," 345 F.2d at 959 (footnote omitted).

8. This gave rise to another series of administrative proceedings, and 11 years later the Commission sought to resolve the problem simply by adding 770 kHz to the list of duplicated channels and recognizing, at least for the time being, WABC as the dominant Class I station while relegating KOB to Class II-A status. *Clear Channel Broadcasting in the Standard Broadcast Band*, 59 F.C.C.2d 32 (1976) [hereinafter *1976 Report and Order*]. In recognition of this decision, Hubbard then filed a competing application—specifying *for the first time* Class I-A operation in Albuquerque—against WABC's application for renewal of license which was then pending before the Commission. The Commission, however, denied Hubbard a hearing on its competing application, indicating that Hubbard, in order to compete with WABC would first be obliged to seek a waiver or amendment of Section 73.22(a). This position was eventually sustained by the Court of Appeals, and, accordingly, Hubbard is now seeking both a waiver of the Commission's rules and "reassignment" of the Class I-A station on the frequency 770 kHz.

II. Applicable Legal Standards

9. As the Commission has historically recognized, assignments and reassignments of radio channels are made

on the basis of relative need of service. These relative needs

> are weighed primarily in light of the number of facilities already in each of the communities and the populations of these communities. The relative needs of the proposed service areas for the services to be received are weighed in terms of the relative populations and extent of the areas proposed to be served and the number of services presently available to these areas, or portions of them.

Radio Greenbrier, Inc., ___ F.C.C.2d ___, 46 P&F Radio Reg. 2d 1467, 1470-71 (Rv. Bd. 1980); *see Amendment of Section 73.202, Table of Assignments, FM Broadcast Stations*, 17 P&F Radio Reg. 2d 1646, 1647-48 (1969).

10. This careful balancing of relative need is, of course, required by the strictures of Section 307(b) of the Communications Act, which provides that in considering applications for modifications and renewals of licenses, the Commission "shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same." *See Amendment of Section 73.202, Table of Assignments, FM Broadcast Stations*, 17 F.C.C.2d 493 (1969).

11. Moreover, this Section 307(b) determination is not a decision to be made only at the time of a station's original licensing. Rather, as the Court of Appeals has reminded the Commission, no such assignment of a facility, presumably even those granted to networks, can be taken as a "permanent" grant in light of the requirements of Section 307(b). *Pasadena Broadcasting Co. v. Federal Communications Commission*, 555 F.2d

1046 (D.C. Cir. 1977). In that case, the Commission asserted that "preexisting broadcast stations can be maintained even though their continuance does not satisfy the strictures of § 307(b)." 555 F.2d at 1051 n.39. However, the court found the Commission's position "belied by the face of the statute, which applies not only to changes in the structure of spectrum allocations, such as grants of new licenses or modifications, but to license renewals as well." *Id.* As the court stated, satisfaction of Section 307(b) "is not, nor ought to be a one-time thing, for the balance of demand for service will shift among communities over time," and it is the Commission's obligation reasonably to respond to these shifting demands. *Id.*

III. Argument

12. KOB's I-A operation in Albuquerque[7] in the accompanying application, would actually promote Section 307(b) and the policies underlying the Commission's clear channel rules. Even assuming the validity of the Commission's 1976 decision to "assign" 770 kHz for I-A operation in New York,[8] which was based on

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[7] Albuquerque is the largest city in New Mexico, with a population estimated by the 1980 census to be 328,837. It is located in Bernalillo County, which, according [to] preliminary 1980 census data, has a population of 414,804. Albuquerque is served locally by five daytime-only AM stations, six unlimited-time AM stations (only two of which have nighttime authority in excess of 500 watts), five FM stations, four non-commercial FM stations, four commercial television stations and one non-commercial television station. *Broadcasting Yearbook*, B-117, C-146-C-147 (1980 vol.).

[8] According to preliminary census data, New York City has a 1980 census of 7,035,348. It is served locally by three Class I-A

[footnote continued]

1970 census data, the recent and dramatic shifts in population reflected in the 1980 census compel the Commission to reassess its 1976 "assignment" in light of the Hubbard proposal. Moreover, "reassignment" of 770 kHz would bring needed radio service to large rural parts of the West and Southwest, thus promoting the underlying basis of the Commission's clear channel service.

A. *"Reassignment" Will Promote The Policies Underlying Section 307(b)*

13. As indicated above, the overriding consideration in balancing the relative need of communities for radio facilities is the requirement of Section 307(b) that radio "licensees, frequencies, hours of operation, and . . . power" be distributed "among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same." Moreover, the intent of Section 307(b) has been found to be primarily to allow sparsely populated areas "especially in the West and Middle West" to secure facilities "to meet the demands of that section of the country." 80 *Cong. Rec.* 6032 (1936).

14. However, as the Commission has historically recognized, the Western and Southwestern areas of the United States still suffer from a relative deprivation of radio service. For example, the so-called "white areas"

AM stations, two Class I-B AM stations, one daytime-only AM station, 12 unlimited-time AM stations (including one non-commercial AM and two operating with 50 kw), 12 commercial FM stations, seven non-commercial FM stations, six commercial television stations and three non-commercial television stations (including WNET (TV)). *Broadcasting Yearbook*, B-118-B-119, C-115-C-156 (1980 vol.).

of the country are located overwhelmingly in the Western States while only a few areas of the Northeast, Southeast and North Central States lack primary service. *1980 Clear Channel Report and Order* at 1120.[9]

15. This relative disparity of radio service is further illustrated by the Commission's distribution of Class I-A channels. As the attached map and listing illustrate, 23 Class I-A stations are located in states lying in the Eastern and Central time zones, while only 2 Class I-A stations—KFI, Los Angeles, and KSL, Salt Lake City—are located in the Mountain and Pacific time zones. *See* Attachment 2; *see also 1980 Clear Channel Report and Order* at 1105. As the map dramatically illustrates, all but a handful of Class I-A stations are located in the Northeast quadrant[10] of the United States, and many parts of the Northeast fall within the 750-mile radii of as many as 20 Class I-A stations. In contrast, much of the West or Southwest falls within the 750-mile radii of only one or two Class I-A stations or, in some cases, no such stations at all.[11]

16. In the past, and certainly when most of the I-A stations were licensed in their present locations, this

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[9] The "white area" map relied on by the Commission in the *1980 Clear Channel Report and Order* is appended hereto as Attachment 1.

[10] As used herein, "Northeast quadrant" refers to the states of Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, West Virginia, Ohio, Michigan, Indiana, Kentucky, Wisconsin, Illinois, Minnesota, Iowa, and Missouri, as well as the District of Columbia.

[11] This disparity was also hinted at by the Commission in the *1980 Clear Channel Report and Order* where the Commission noted that most Americans are secondarily served by "between 4 and 20" Class I-A signals. 47 P&F Radio Reg. 2d at 1105; *see also Hubbard Broadcasting, Inc.*, 35 F.C.C. 36, 40 (1963).

disparity of service might have been explained as necessary to provide the largest segment of the population, then located primarily in the Northeast, with the largest block of radio service. In 1930, for example, the states of the Northeast quadrant comprised 61.51 per cent of the nation's population (75,581,750 persons of a total of 123,202,624). *U.S. Department of Commerce, Characteristics of the Population* 1-48 (1970). In fact, the population of New York State alone accounted for 10.22 per cent of the total population. *Id.*

17. However, population figures no longer support the continued licensing of the overwhelming majority of Class I-A stations in the Northeast. In fact, census data recently released by the Census Bureau reveal a significant and growing transmigration of people toward the West and Southwest. For example, the population growth from 1970 to 1980 in the West, including New Mexico, averaged 23.9 per cent, while the Middle Atlantic states, including New York, averaged a 1.1 per cent loss over the past decade. *See* Attachment 3. In addition, while those states in the Northeast quadrant which have I-A "assignments" averaged only a 3.49 per cent growth rate over the past ten years,[12] those in Mountain and Pacific states without Class I-A facilities averaged 33.36 per cent.[13]

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[12] These are the states of Minnesota (7.1 per cent), Iowa (3.1 per cent), Missouri (5.1 per cent), Illinois (2.8 per cent), Michigan (4.2 per cent), Ohio (1.3 per cent), Kentucky (13.17 per cent), Pennsylvania (0.6 per cent), New York (-3.8 per cent) and Massachusetts (0.18 per cent). Of these states, only Kentucky's growth rate exceeded the national average of 11.4 per cent.

[13] These are the states of Montana (13.3 per cent), Idaho (32.4 per cent), Wyoming (41.6 per cent), Colorado (30.17 per cent), New Mexico (27.8 per cent), Arizona (53.1 per cent), Washington (21.0 per cent), Oregon (25.9 per cent), Alaska (32.4 per cent) and Hawaii (25.3 per cent).

18. Nor are the actual population figures of the Mountain and Pacific states insignificant. Rather, the data shows the combined populations to be 43,165,199 as compared with a total population of 119,071,062 for the states of the Northeast quadrant. Thus, while the Northeastern states comprise less than 53 per cent of the population, they have located within their borders 72 per cent of the available Class I-A stations. Further, while the Western States comprise more than 19 per cent of the population, they have only 8 per cent of the available Class I-A stations.[14]

19. Moreover, these population trends may be expected to continue. For example, the Economic Unit of *U.S. News and World Report* estimates that the Mountain states of Montana, Idaho, Wyoming, Nevada, Utah, Colorado, Arizona and New Mexico will register an average population increase of 24 per cent from 1977 to 1987, the highest of any region in the country. *U.S. News and World Report* 60 (May 30, 1977). On the other hand, it is estimated that the Middle Atlantic states of New York, New Jersey and Pennsylvania over the same period will show an increase of only three per cent, the lowest growth rate of any region. *Id.*

20. The data are even more dramatic in the specific comparison of New York and New Mexico. While New York posted population *loss* of 3.8 per cent or, 684,103 of its residents from 1970 to 1980, the largest loss of any state, New Mexico's population grew by 27.8 per cent, or, 282,913. In addition, preliminary figures

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[14] As detailed herein, this disparity in I-A distribution is heightened by the fact that clear channel stations were intended to serve the relatively sparsely populated areas of the country. *See infra* at 15-16.

released by the Census Bureau show New York City's population to have declined from 7,895,563 in 1970 to 7,035,348 in 1980, a loss of 10.89 per cent.[15] *See* Attachment 4. In the same period, however, Albuquerque's population has increased from 244,501 in 1970 to 328,837 according to preliminary 1980 census data, an increase of 34.5 per cent. *See* Attachment 6 at Figure 8.[16] Yet, New York City has three Class I-A stations licensed to it and is within the secondary service area of at least 12 other I-A stations. By contrast, Albuquerque has no I-A facility licensed to it and is only in the outer reaches of four I-A stations.

21. Nor does the fact that new, low-power stations have been licensed to New Mexico ameliorate the increasing need for reliable high-power service in the West. *1976 Report and Order* at 42-43. Initially, such an argument ignores the relative growth of services elsewhere, a comparison crucial to evaluation of need under Section 307(b). Thus, while it may be true that the Commission since 1965 has licensed 37 new stations in New Mexico, the Commission has also licensed at least 117 stations in New York—a state with a declining population—in the same time period. *Broadcasting Yearbook* C-146-C-160 (1980 vol.).

22. Moreover, despite the addition of a low-coverage station here and there in New Mexico, Hubbard's proposed change from II-A to I-A operation would mean a gain in primary service of 245,400 persons. Attachment

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[15] Hubbard will supplement the instant petition with final data when they are released by the Commerce Department.

[16] Attachment 6 is engineering data compiled by Lohnes & Culver, consulting engineers, and submited with Hubbard's I-A application.

6, Figure 8. This represents a white area gain of 97,900 persons who have no other primary aural service and a gray area gain of 27,600 persons who have only one other primary aural service. *Id.*

23. In this regard, the instant situation seems analagous to *Radio Cincinnati, Inc. v. Federal Communications Commission*, 177 F.2d 92 (D.C. Cir. 1949), which also involved the relative needs of two communities. There, stations in Lansing, Michigan and Cleveland, Ohio, sought mutually exclusive facilities, and the court upheld the Commission's grant to the Lansing station. The court emphasized that Lansing had only one station while Cincinnati had "*five fulltime* stations." 177 F.2d at 95 (emphasis in original). In addition, the court found of "vital" significance

> the conceded fact that the proposed additional coverage by [the losing applicant] would reach no area or person not already served by some radio station, whereas the proposal of [the winning applicant] would serve 5,000 persons in the same area of 550 square miles who are now without primary broadcast service during the daylight hours.

Id. Indeed, the instant proposal is even more compelling in that it will also provide needed secondary service to the West and Southwest. See *infra* at 16-17.

24. Moreover, Hubbard submits that 770 kHz is the most appropriate channel for Hubbard to seek I-A authority on. KOB has operated on 770 kHz since 1941 and is presently authorized as the only Class II-A station on the frequency. Thus, the Commission could serve the requirements of Section 307(b) while causing the minimum amount of disruption of existing service.

25. Finally, the present time seems to be the most appropriate since WABC's current license expires June 1,

1981. While ABC has filed for renewal of the license of WABC, processing of the renewal "assumes the continued availability of the channel," and such continued availability "under the scheme of the Act as a whole, is subject to action of the Commission in a rule making proceeding." *Transcontinent TV Corp. v. Federal Communications Commission*, 308 F.2d 339, 344 (D.C. Cir. 1962). *See Petition to Reallocate VHF-TV Channel 9 from New York, New York to a City Within the City Grade Contour of Station WOR-TV*, ___ F.C.C.2d ___, para. 16 (FCC 80-654, released January 13, 1981). As the Commission has found, the requirements of Section 307(b) may well require reassignment of a particular channel even when there is a pending application for use of the channel in its originally assigned location. *E.g., Amendment of Section 73.202, Table of Assignments, FM Broadcast Stations*, 20 F.C.C.2d 487, 489, *denying reconsideration* to 17 F.C.C.2d 493 (1969).

26. In sum, given the substantial shifts in population as well as the prosepct of providing a first primary service to a substantial segment of persons, Hubbard urges that the Commission must reassess its assignment of 770 kHz for I-A operation at New York City. This is no more than Section 307(b) obligates the Commission to do. As the United States Court of Appeals for the District of Columbia Circuit has said, the Commission must "reasonably respond to changing conditions" since satisfaction of the strictures of 307(b) demands that allocation of frequencies should not be "a one-time thing, for the balance of demand for service will shift among communities over time." *Pasadena Broadcasting Co. v. Federal Communications Commission*, 535 F.2d at 1051 n.39.

B. *"Reassignment" Will Promote the Policies Underlying the Commission's Clear Channel Service.*

27. It is by now axiomatic that clear channel stations were not intended to serve large urban centers but instead were meant to serve relatively rural, sparsely populated areas through clear channel stations' ability to provide secondary, or, skywave, service. As the Commission has said, clear channel stations

> are necessary for standard broadcast service to rural areas since channels which are primarily allocated for service to population centers (the so-called regional and local channels) must be shared by a multiplicity of stations and are, therefore, cluttered with interference—particularly at night when propagation conditions make interference problems more acute—to such an extent that each station provides satisfactory service only over relatively short distances where its signals are strong enough to override interference. Rural areas beyond these distances thus receive no service from such stations and must rely on the 10-to-50-kilowatt clear channel stations.

Federal Communications Commission, Seventeenth Annual Report 117 (1952); *see 1980 Clear Channel Report and Order* at 1103. Indeed, the Commission recently reaffirmed its commitment to such wide-area service in the *1980 Clear Channel Report and Order.* 47 P&F Radio Reg. 2d at 1112.

28. Moreover, the Commission has recognized that the clear channel stations, particularly Class I-A stations, are unique in their ability to provide secondary service over wide areas. Thus, for example, the Commission has found that only Class I stations have the potential of providing skywave service to sparsely populated areas

because only Class I stations "receive protection which enables them to render nighttime skywave service" beyond their primary service areas. *1980 Clear Channel Report and Order* at 1105.

29. However, as outlined above, the Commission has located the majority of Class I stations in the relatively densely populated areas of the Northeast. For example, 18 of the 25 nondirectional Class I-A stations, *see* Attachment 2, and 16 of the 34 more limited range Class I-B stations are located in the Northeast, *see* Attachment 5. By contrast, only 2 Class I-A, *see* Attachment 2, and 10 Class I-B stations, *see* Attachment 5, are located in the Mountain and Pacific states even though these states comprise nearly half the land area of the United States and are relatively underserved and sparsely populated.

30. Accordingly, "assignment" of 770 kHz for Class I-A operation in Albuquerque would serve the basic purpose underlying the Commission's clear channel service by bringing additional secondary service to sparsely populated areas of the West and Southwest. Indeed, engineering data submitted in the I-A application estimate a secondary service gain of 8,777,100 persons for KOB as a I-A station. *See* Attachment 6, Figure 8. Remarkably, this represents an increase of 21.7 per cent over the secondary service estimated in KOB's I-A application just three years ago. *Id.*[17]

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[17] At that time secondary service gain based on 1970 census data, showed a secondary service gain of 7,211,800. Other population comparisons are also dramatic. For example, while 627,000 persons were estimated to be within KOB's 0.5 mV/m interference-free I-A contour in 1978, 846,700 persons are now estimated to be within this contour now. *See* Attachment 6, Figure 8.

C. *No Court Decision Prohibits Grant of the Requested "Reassignment."*

31. On occasion the Commission has indicated that despite the merits of KOB's proposals, the FCC is effectively prohibited by various decisions of the United States Court of Appeals for the District of Columbia Circuit from restoring KOB to Class I status. For example, in seeking summary affirmance in the latest appeal involving KOB, the Commission asserted that it "could not grant Hubbard I-A authority, even if it wanted to" without violating the decisions of the Court leading up to the adoption of the *1976 Report and Order. Appellee's Motion for Summary Affirmance* at 12.

32. However, no decision of the Court of Appeals mandates that Hubbard be denied I-A status in the future in light of changing population patterns and a worsening of the relative disparity of service between the West and Northwest. Clearly, one applicant's status as a network may be considered, but such status cannot be made the controlling factor. Indeed, Hubbard may not be permanently denied particular radio facilities merely because the mutually exclusive applicant for similar facilities is a radio network without violating the strictures of the Communications Act as well as fundamental tenets of equal protection.

33. The Communications Act, its legislative history, and prior Commission decisions or policies, create no special, protected class for radio networks in general or ABC in particular, and the Act confers no rights on radio networks greater than those of any other applicant for radio facilities. Thus, as applicants for similar facilities, Hubbard and ABC must be judged primarily not by their status as network or non-network applicants, but, rather, according to the Commission's traditional

comparative criteria, particularly the mandate of the Communications Act that Radio facilities be licensed so as to provide a "fair, efficient, and equitable distribution of radio service" among the several states. 47 U.S.C. § 307(b) (1970).

34. Moreover, the creation by the Commission or the court of a special class of network applicants would violate fundamental tenets of equal protection. *U.S. Const.* amend. V. Basic to the idea of equal protection is the notion that the government may not

> make a classification of individuals or corporations which is purely arbitrary, and impose upon such class special burdens and liabilities. Even where the selection is not obviously unreasonable and arbitrary, if the discrimination is based upon matters which have no relation to the object sought to be accomplished, the same conclusion of unconstitutionality is affirmed.

Atchison, Topeka & Santa Fe Railroad Co. v. Matthews, 174 U.S. 96, 105 (1899). As stated above, the purported distinction between ABC and Hubbard – that one is owned by a network and the other is not – has no basis in the language or legislative history of the Communications Act and no basis in any other decision or policy of the Commission. Accordingly, ABC or any other network is not automatically entited to clear channel facilities merely because of its status as a network, and Hubbard may not be permanently proscribed from seeking a Class I-A facility solely because the other applicant on 770 kHz owns and operates a radio network.

35. WABC, just as any other applicant, may seek a Class I- . station on any other clear channel frequency. As this court has stated, there is a variety of ways in which WABC might be accommodated, including the

filing by WABC of "competitive applications when present licensees on other frequencies seek renewal." *American Broadcasting-Paramount Theatres, Inc. v. Federal Communications Commission*, 280 F.2d 631, 636 (D.C. Cir. 1960).

36. To decide otherwise would be to grant WABC a permanent license to a Class I-A station even though the Communications Act confers no extraordinary rights to facilities on radio networks apart from the rights of any other applicant. In fact, it has long been held that no Commission licensee "obtains any vested interest in any frequency" through the grant of a Commission license to operate. *Ashbacker Radio Corp. v. Federal Communications Commission*, 326 U.S. 327, 331 (1945); *accord Federal Communications Commission v. Sanders Bros. Radio Station*, 309 U.S. 470, 475 (1940); *see also* 47 U.S.C. §§ 301, 303(m), 307(d) (1970).

37. Moreover, if the court's decisions mandate that Hubbard may never be given I-A facilities, even in light of changing conditions, because of ABC's status as a radio network, then they also mandate that no one can ever displace ABC—even with an application specifying I-A operation in New York City—as the licensee of WABC. That is, under the Commission's apparent reading of the court's decision, as long as ABC maintains a radio network, it is automatically and absolutely authorized to be awarded a I-A "flagship" station in New York if other radio networks happen to operate such facilities.

38. Not only is such a reading inconsistent with the Constitution and the Communications Act, but it can lead to ludicrous and unworkable results. For example, if a network has a right to a I-A "flagship" station, the Mutual Broadcasting System, which recently acquired Class II station WHN in New York, is entitled to demand

and receive Class I-A status. Likewise, any existing or future radio network could presumably demand a Class I-A facility.

39. Finally, even considering ABC's status as a network, it can hardly be said that ABC will suffer an unfair disadvantage if WABC is displaced as the I-A station on 770 kHz. Since the court's 1965 decision, ABC has established and operated four radio networks. *Proposal of American Broadcasting Co.'s Inc., to Establish Four New Specialized "American Radio Networks,"* 11 F.C.C.2d 163 (1967).[18] Indeed, as of 1979, ABC had at least 1506 radio affiliates as compared to approximately 299 affiliates for CBS and 282 for NBC. *Broadcasting Yearbook* D-22-D-41 (1980 vol.). Moreover, ABC's networks have shown significant growth since the Commission's *1976 Report and Order.* In fact, since 1976 ABC has added approximately 106 radio affiliates, an increase of about 7.57 per cent. *Broadcasting Yearbook* D-23-D-30 (1977 vol.).

40. Further, ABC can claim no particular disadvantage as to wide-area skywave coverage by high-power Class I stations. Of network-affiliated Class I stations, 16 are affiliated with ABC as compared to 16 for CBS and 15 for NBC. Attachments 2 and 5. This represents two additional Class I affiliates (WOR, New York and KAAY, Little Rock) since the *1976 Report and Order. Compare Broadcasting Yearbook* D-23-D-30 (1977 vol.).

41. It should also be emphasized that KOB's I-A operation would help alleviate a serious disadvantage to the NBC radio network in the Mountain and Pacific states. Both CBS and ABC have I-A affiliates in the

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[18] In 1965, ABC had only 431 radio affiliates. *Broadcasting Yearbook* E-8 (1966 vol.).

West, but NBC has no such affiliate. Attachments 2 and 5. Moreover, while NBC has only one I-B affiliate in the West, ABC has 4 I-B affiliates in the West and CBS has 5. Thus, KOB, an NBC affiliate, would provide an important second skywave signal for NBC and NBC's first I-A skywave signal in the West. *See 1976 Report and Order* at 44.

IV. Conclusion

42. In summary, Hubbard submits that the Commission should "reassign" 770 kHz so as to allow Class I-A operation in Albuquerque. The dramatic shifts in population away from the Northeast and toward the West as well as the continuing comparative lack of service in the West mandate that the Commission reassess its earlier "assignment." Moreover, "reassignment" would serve the ultimate interests of the Commission's clear channel rules.

WHEREFORE, the premises considered, Hubbard Broadcasting, Inc., respectfully requests that Section 73.22 of the Commission's rules be amended to specify operation by a Class I-A station on 770 kHz in Albuquerque, New Mexico.

Respectfully submitted,

HUBBARD BROADCASTING, INC.

By /s/ Frank U. Fletcher

By _____
Robert L. Heald

By /s/ Marvin Rosenberg

By /s/ Robert L. Pettit

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March 9, 1981

CERTIFICATE OF SERVICE

I, Ruth B. Yates, a secretary in the law firm of Fletcher, Heald & Hildreth, do hereby certify that copies of the foregoing "Petition for Rulemaking" were sent this 9th day of March, 1981, by first-class United States mail, postage prepaid, to the following:

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APPENDIX D

COMMUNICATIONS ACT OF 1934, AS AMENDED

TITLE 47 U.S.C.

Title IV– Procedural and Administrative Provisions

SEC. 402

(a) Any proceeding to enjoin, set aside, annul, or suspend any order of the Commission under this chapter (except those appealable under subsection (b) of this section) shall be brought as provided by and in the manner prescribed in chapter 19A of Title 5.

Right to appeal

(b) Appeals may be taken from decisions and orders of the Commission to the United States Court of Appeals for the District of Columbia in any of the following cases:

(1) By any applicant for a construction permit or station license, whose application is denied by the Commission.

(2) By any applicant for the renewal or modification of any such instrument of authorization whose application is denied by the Commission.

(3) By any party to an application for authority to transfer, assign, or dispose of any such instrument of authorization, or any rights thereunder, whose application is denied by the Commission.

(4) By any applicant for the permit required by section 325 of this title whose application has been

denied by the Commission, or by any permittee under said section whose permit has been revoked by the Commission.

(5) By the holder of any construction permit or station license which has been modified or revoked by the Commission.

(6) By any other person who is aggrieved or whose interests are adversely affected by any order of the Commission granting or denying any application described in paragraphs (1)-(4) of this subsection.

(7) By any person upon whom an order to cease and desist has been served under section 312 of this title.

(8) By any radio operator whose license has been suspended by the Commission.

Filing notice of appeal; contents; jurisdiction; temporary orders

(c) Such appeal shall be taken by filing a notice of appeal with the court within thirty days from the date upon which public notice is given of the decision or order complained of. Such notice of appeal shall contain a concise statement of the nature of the proceedings as to which the appeal is taken; a concise statement of the reasons on which the appellant intends to rely, separately stated and numbered; and proof of service of a true copy of said notice and statement upon the Commission. Upon filing of such notice, the court shall have jurisdiction of the proceedings and of the questions determined therein and shall have power, by order, directed to the Commission or any other party to the appeal, to grant such temporary relief as it may deem just and proper. Orders granting temporary relief may be either affirma-

tive or negative in their scope and application so as to permit either the maintenance of the status quo in the matter in which the appeal is taken or the restoration of a position or status terminated or adversely affected by the order appealed from and shall, unless otherwise ordered by the court, be effective pending hearing and determination of said appeal and compliance by the Commission with the final judgment of the court rendered in said appeal.

Notice to interested parties; filing of record

(d) Upon the filing of any such notice of appeal the Commission shall, not later than five days after the date of service upon it, notify each person shown by the records of the Commission to be interested in said appeal of the filing and pendency of the same and shall thereafter permit any such person to inspect and make copies of said notice and statement of reasons therefor at the office of the Commission in the city of Washington. Within thirty days after the filing of an appeal, the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of Title 28.

Intervention

(e) Within thirty days after the filing of any such appeal any interested person may intervene and participate in the proceedings had upon said appeal by filing with the court a notice of intention to intervene and a verified statement showing the nature of the interest of such party, together with proof of service of true copies of said notice and statement, both upon appellant and upon the Commission. Any person who would be aggrieved or whose interest would be adversely affected

by a reversal or modification of the order of the Commission complained of shall be considered an interested party.

Record and briefs

(f) The record and briefs upon which any such appeal shall be heard and determined by the court shall contain such information and material, and shall be prepared within such time and in such manner as the court may by rule prescribe.

Time of hearing; procedure

(g) At the earliest convenient time the court shall hear and determine the appeal upon the record before it in the manner prescribed by section 1009(e) of Title 5.

Remand

(h) In the event that the court shall render a decision and enter an order reversing the order of the Commission, it shall remand the case to the Commission to carry out the judgment of the court and it shall be the duty of the Commission, in the absence of the proceedings to review such judgment, to forthwith give effect thereto, and unless otherwise ordered by the court, to do so upon the basis of the proceedings already had and the record upon which said appeal was heard and determined.

Judgment for costs

(i) The court may, in its discretion, enter judgment for costs in favor of or against an appellant, or other interested parties intervening in said appeal, but not against the Commission, depending upon the nature of

the issues involved upon said appeal and the outcome thereof.

Finality of decision; review by Supreme Court

(j) The court's judgment shall be final, subject, however, to review by the Supreme Court of the United States upon writ of certiorari on petition therefor under section 1254 of Title 28, by the appellant, by the Commission, or by any interested party intervening in the appeal, or by certification by the court pursuant to the provisions of that section. June 7, 1934, c. 426, 48 Stat. 926; June 19, 1934, c. 652, Title IV, § 402, 48 Stat. 1093; May 20, 1937, c. 229, §§ 11–13, 50 Stat. 197; May 24, 1949, c. 139, § 132, 63 Stat. 108; July 16, 1952, c. 879, § 14, 66 Stat. 718; Aug. 28, 1958, Pub. L. 85–791, § 12, 72 Stat. 945.

Supreme Court, U.S.
FILED
JAN 10 1983
ALEXANDER L. STEVAS
CLERK

No. 82-772

In the Supreme Court of the United States

OCTOBER TERM, 1982

HUBBARD BROADCASTING, INC., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly concluded that the Federal Communications Commission's decision denying petitioner's application for reclassification of its radio station's status from Class II-A to Class I-A is an exercise of the Commission's licensing authority, and is therefore reviewable exclusively in the United States Court of Appeals for the District of Columbia Circuit under Section 402(b) of the Communications Act of 1934, 47 U.S.C. 402(b).

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1. This case involves a controversy that began in 1941 and that has been litigated before the Federal Communications Commission and the courts almost continuously ever since (Pet. App. 9a). The dispute centers on which of two radio stations licensed by the Commission to operate on the clear channel frequency 770 kHz will be the dominant station.[1]

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[1]Since 1941, radio station WABC in New York City has been permitted to operate as the dominant, or Class I-A, station on 770 kHz. Radio station KOB in Albuquerque, New Mexico, licensed to petitioner Hubbard Broadcasting Co., has been required to operate on the frequency as the non-dominant, or Class II-A, station. The result has been to afford WABC's signal a much greater area of coverage than KOB's. The Commission order contains a brief explanation of "clear channels" in the radio broadcast service. See Pet. App. 8a & n.1; see also Pet. 3-4. In addition to the decisions cited in the text, the extensive background of this controversy is set out in: *American Broadcasting Co. v. FCC*,

After extensive rulemaking proceedings, the Commission in 1976 permanently assigned the Class I-A channel to New York City and the Class II-A channel to New Mexico. *In re Clear Channel Broadcasting, KOB/WABC*, 59 F.C.C.2d 32 (1976). This case represents petitioner's third challenge to that decision by the Commission. In 1977 the United States Court of Appeals for the District of Columbia Circuit affirmed without opinion the Commission's 1976 rulemaking decision. *Hubbard Broadcasting, Inc.* v. *FCC*, 564 F.2d 600, cert. denied, 435 U.S. 968 (1978). In 1980 the same court summarily affirmed the Commission's rejection of petitioner's application to operate as a Class I-A station in New Mexico because the application was inconsistent with the Commission's 1976 decision. *Hubbard Broadcasting, Inc.* v. *FCC*, 663 F.2d 220.

Less than three months after the District of Columbia Circuit's second *Hubbard* decision, petitioner once again applied to the Commission for a permit to operate as a Class I-A station in New Mexico. Its application was accompanied by requests that the Commission waive or change the 1976 rule assigning the Class I-A station to New York. The Commission dismissed all of those applications because it and the court of appeals had repeatedly addressed the relevant issues and because petitioner had offered no new grounds to warrant reexamination of those earlier conclusions (Pet. App. 7a).

For the third time petitioner sought judicial review—this time in the United States Court of Appeals for the Eighth

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191 F.2d 492 (D.C. Cir. 1951); *American Broadcasting-Paramount Theatres, Inc.* v. *FCC*, 14 Rad. Reg. (P & F) 2020 (D.C. Cir. Sept. 27, 1956); *In re Albuquerque Broadcasting Co.*, 25 F.C.C. 683 (1958), aff'd, *American Broadcasting-Paramount Theatres, Inc.* v. *FCC*, 280 F. 2d 631 (D.C. Cir. 1960); *In re Hubbard Broadcasting, Inc.*, 35 F.C.C. 36 (1963), rev'd, *American Broadcasting-Paramount Theatres, Inc.* v. *FCC*, 345 F.2d 954 (D.C. Cir. 1965), cert. denied, 383 U.S. 906 (1966).

Circuit. That court held that it was without jurisdiction. It concluded that the FCC's action "was, as a matter of substance, the exercise by FCC of its 'radio-licensing power,' " and therefore reviewable exclusively in the United States Court of Appeals for the District of Columbia Circuit under Section 402(b) of the Communications Act of 1934, 47 U.S.C. 402(b). The court held that

> to permit Hubbard to split off a part of the "package" [of a license application and petition for rule change] in a transparent attempt to obtain jurisdiction in a forum other than the Court of Appeals for the District of Columbia, which has twice ruled against reclassifying KOB and WABC as directionalized stations on 770 kHz, would frustrate the clear intent of Congress that judicial review of all cases involving FCC's "radio-licensing power" be limited to the United States Court of Appeals for the District of Columbia.

(Pet. App. 5a). Accordingly, the court dismissed the petition for want of jurisdiction.

2. The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. The petition presents no question that warrants this Court's review.[2]

Section 402 of the Communications Act of 1934, 47 U.S.C. 402, provides two paths for judicial review of FCC actions. Section 402(b) confers exclusive jurisdiction on the

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[2]Respondent United States took no position below on the court's jurisdiction, but fully supported the Commission on the merits. The United States continues to take no position on the jurisdictional issue. But, believing that petitioner's case in the court of appeals was insubstantial on the merits and that the jurisdictional issue presented by the unusual circumstances of this case does not in any event warrant review by this Court, the United States agrees with the Commission that the petition should be denied.

United States Court of Appeals for the District of Columbia Circuit over appeals from decisions and orders of the FCC in eight categories of cases associated with the Commission's licensing powers. Section 402(a) provides that proceedings to review all other Commission orders shall be brought in the various courts of appeals under the normal rules of venue specified in 28 U.S.C. 2342(1) and 2343.

In 1952 Congress amended Section 402(b) to "make clear that judicial review of all cases involving the exercise of the Commission's radio-licensing power is limited to [the Court of Appeals for the District of Columbia]." S. Rep. No. 44, 82d Cong., 1st Sess. 11 (1951). See Pub. L. No. 554, ch. 879, 66 Stat. 718-719. The courts of appeals have refused to read Section 402(b) in a manner that would conflict with this purpose. Instead, as the opinion below recognized (Pet. App. 4a), they have required orders to be appealed to the District of Columbia Circuit under Section 402(b) whenever they bear a "close functional similarity" to orders specifically appealable under Section 402(b),[3] or are "ancillary" to,[4] "in aid of,"[5] or "intimately associated with"[6] the exercise of the FCC's licensing power. In so applying the statute, the courts of appeals, including the court below (Pet. App. 5a), have followed this Court's holding that in applying Section 402 of the Act, it is necessary to look to "the substance of what the Commission has purported to do and has done." *Columbia Broadcasting System, Inc.* v. *United States*, 316 U.S. 407, 416 (1942).

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[3] *Metropolitan Television Co.* v. *United States*, 221 F.2d 879, 880 (D.C. Cir. 1955).

[4] *Helena TV, Inc.* v. *FCC*, 269 F.2d 30 (9th Cir. 1959); *Tomah-Mauston Broadcasting Co.* v. *FCC*, 306 F.2d 811, 812 (D.C. Cir. 1962); *National Association of Broadcasters* v. *FCC*, 554 F.2d 1118, 1121 n.1 (D.C. Cir. 1976).

[5] *Cook, Inc.* v. *United States*, 394 F.2d 84, 87 (7th Cir. 1968).

[6] *WHDH, Inc.* v. *United States*, 457 F.2d 559, 561 (1st Cir. 1972).

Petitioner acknowledges (Pet. 8) that the Commission's dismissal of its application to modify its station's license was appealable only to the District of Columbia Circuit under Section 402(b). However, it contends that the petition to amend the Commission's rule that prevented the grant of its station application was a "wholly independent" matter (Pet. 9) and thus reviewable under 47 U.S.C. 402(a) in other circuits. This argument is erroneous.

As the Commission pointed out in its decision, the rule change that petitioner sought "would only apply to station KOB" (Pet. App. 8a n.2). The Commission thus treated the rulemaking petition and the license application, which was accompanied by a request for a waiver of the rule, as "functionally equivalent" and therefore part of a single package (*ibid.*). In this it was correct. The sole purpose of the rule change (or waiver) sought by petitioner was to enable it to become the licensee of a clear channel station in New Mexico. And, therefore, the effect of the jurisdictional splitting sought by petitioner would in substance be to give it a third crack at a license in a forum other than the one exclusively authorized to review licensing decisions and that—not coincidentally—has twice rejected petitioner's claims to such a license.

The court of appeals agreed with the Commission's description of the petition and application as "inextricably interwined" (Pet. App. 2a) and properly rejected petitioner's attempt "to split off a part of the 'package' [because it was] * * * a transparent attempt to obtain jurisdiction in a forum other than" the Court of Appeals for the District of Columbia Circuit, in contravention of Congress' clear intent to confine judicial review of all cases involving the FCC's "radio-licensing power" to that circuit (Pet. App. 5a).

The court of appeals' interpretation of Section 402(b) is explicitly grounded on and fully consistent with the interpretation of the statute articulated by every court of appeals that has addressed the question (see notes 3-6, *supra*) and by this Court (see *FCC* v. *Columbia Broadcasting System*, 311 U.S. 132, 134 (1940); *Columbia Broadcasting System* v. *United States*, *supra*; *Scripps-Howard Radio, Inc.* v. *FCC*, 316 U.S. 4, 6-9 (1942)).[7] Its decision was, further, made in a case that had twice been fully considered on the merits by the United States Court of Appeals for the District of Columbia Circuit. Review by this Court therefore is unnecessary.

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[7]The decisions of the Seventh Circuit in *Campos* v. *FCC*, 650 F.2d 890 (7th Cir. 1981), and of the Third Circuit in *New Jersey Coalition for Fair Broadcasting* v. *FCC*, 574 F.2d 1119 (3d Cir. 1978), upon which petitioner relies in asserting a conflict among the circuits (Pet. 11-12), do not support its position. *Campos* concerned an FCC decision effectively denying an application for a radio operator's license. The court noted that seven of the eight categories in Section 402(b) refer to orders granting, denying, modifying, or revoking construction permits and station licenses, not operator's licenses. The eighth refers to orders *suspending* an operator's license, but not those denying an application for such a license. The court therefore held that orders of the latter type were reviewable pursuant to Section 402(a). 650 F.2d at 892-893. The instant case, by contrast, involves two "inextricably intertwined" FCC actions, one of which is specifically enumerated as appealable only under Section 402(b) (i.e., denial of the station license application) and the other of which is functionally equivalent in the circumstances of this case (i.e., dismissal of the rulemaking petition that would have amended a rule applicable only to the KOB-WABC controversy).

The *New Jersey Coalition* decision did not discuss the jurisdictional question. In any event, unlike the instant case, in which petitioner sought an agency rule change affecting only these two radio stations, *New Jersey Coalition* arose from a generalized FCC inquiry into the needs of the state of New Jersey for television service. 574 F.2d at 1121.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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No. 82-772

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

HUBBARD BROADCASTING, INC.,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

BRIEF FOR AMERICAN BROADCASTING COMPANIES, INC. IN OPPOSITION

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QUESTION PRESENTED

Whether the United States Court of Appeals for the Eighth Circuit reasonably concluded that an order of the Federal Communications Commission (the "Commission") was reviewable under Section 402(b) of the Communications Act of 1934, as amended, 47 U.S.C. § 402(b) (1976), as "ancillary" to the Commission's radio-licensing power, where the order denied a "package" of applications comprised of a rulemaking petition and application for modification of a construction permit, which were deemed functionally equivalent by the Commission and which presented facts considered by the District of Columbia Circuit on six prior occasions.

PARTIES TO THE PROCEEDING IN THE COURT BELOW

The following is a list of all parties that appeared before the court whose judgment is sought to be reviewed: Hubbard Broadcasting, Inc., the Federal Communications Commission and the United States of America, American Broadcasting Companies, Inc., and Jackson and Chaisson Broadcasting Systems, Inc.*

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* In light of the purposes of Rule 28.1, we construe the terms "parent companies," "subsidiaries and affiliates" to mean those corporations (1) whose shares are publicly traded; (2) in the case of "parent companies," which own a majority of the shares of a party; and (3) in the case of "subsidiaries and affiliates," a majority of whose shares are owned by a party.

American Broadcasting Companies, Inc. has no "parent companies," "subsidiaries and affiliates" so defined.

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IN THE

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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

BRIEF FOR AMERICAN BROADCASTING COMPANIES, INC. IN OPPOSITION

Respondent American Broadcasting Companies, Inc. respectfully requests that this Court deny the Petition for a Writ of Certiorari filed herein on November 4, 1982, to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on August 6, 1982.

COUNTERSTATEMENT OF THE CASE

This case dates from 1941 and has been before the United States Court of Appeals for the District of Columbia Circuit six times.[1] This Court has twice denied

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[1] *Hubbard Broadcasting, Inc. v. FCC*, —— U.S. App. D.C. ——, 663 F.2d 220 (1980); *Hubbard Broadcasting, Inc. v. FCC*, 184 U.S. App. D.C. 115, 564 F.2d 600 (1977), *cert. denied*, 435 U.S. 968 (1978); *American Broadcasting-Paramount Theatres, Inc. v. FCC*,

certiorari.[2] As the Commission has observed, "[n]o other station assignment among the thousands so far established has approached this one in the length, complexity, and thoroughness of the consideration that has been accorded in adjudicatory and rulemaking proceedings before the Commission, and in repeated judicial reviews." *Clear Channel Broadcasting in the AM Broadcast Band, Further Notice of Proposed Rule Making*, 70 F.C.C.2d 1077, 1107 (1979).

The long and tortuous history of the "KOB problem" will not be detailed here. It is sufficient to note that in 1976 the Commission terminated a rulemaking commenced in 1945 to resolve that problem. *Clear Channel Broadcasting in the Standard Broadcast Band (KOB/WABC)*, 59 F.C.C.2d 32 (1976) (cited hereinafter as "1976 Report and Order"). Consistent with its treatment of eleven other eastern clear channels, and with due regard for prior court decisions mandating equal treatment for the three national networks,[3] the Commission concluded in the 1976 Report and Order that the public interest would best be served by classifying KOB as a Class II-A station on 770 kHz, directionalized at night to protect the service area of Class I-A Station WABC.[4] The District of Columbia Circuit affirmed the

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120 U.S. App. D.C. 264, 345 F.2d 954 (1965), *cert. denied*, 383 U.S. 906 (1966); *American Broadcasting-Paramount Theatres, Inc. v. FCC*, 108 U.S. App. D.C. 83, 280 F.2d 631 (1960); *American Broadcasting-Paramount Theatres, Inc. v. FCC*, 14 R.R. 2020 (D.C. Cir. 1956); *American Broadcasting Co. v. FCC*, 89 U.S. App. D.C. 298, 191 F.2d 492 (1951).

[2] 435 U.S. 968 (1978); 383 U.S. 906 (1966).

[3] *See American Broadcasting-Paramount Theatres, Inc. v. FCC*, 120 U.S. App. D.C. 264, 345 F.2d 954 (1965), *cert. denied*, 383 U.S. 906 (1966); *American Broadcasting-Paramount Theatres, Inc. v. FCC*, 108 U.S. App. D.C. 83, 280 F.2d 631 (1960).

[4] Due to the unique propagation characteristics of the AM broadcasting service, the nighttime signal of AM stations may be transmitted many hundreds of miles in erratic fashion, presenting poten-

1976 Report and Order,[5] and this Court denied certiorari. 435 U.S. 968 (1978).[6]

Having failed to overturn the Commission's 1976 decision by direct appeal, Petitioner next filed an application for non-directional operation at Albuquerque. That application was rejected as inconsistent with the 1976 Report and Order where the Commission, after exhaustive consideration, had allocated the I-A station on 770 kHz to New York and the II-A station on that frequency to New Mexico. *Hubbard Broadcasting, Inc.*, 44 R.R.2d 1005 (1978), *reconsideration denied*, 71 F.C.C.2d 591 (1979). The D.C. Circuit, in summarily affirming the Commission's order, optimistically concluded that "this forty year old controversy is finally brought to an end." *Hubbard Broadcasting, Inc. v. FCC*, —— U.S. App. D.C. ——, ——, 663 F.2d 220, 223 (1980).

Less than three months after that court affirmance, Petitioner filed a rulemaking petition seeking amendment of Commission Rule 73.22[7] to provide for a Class I-A station in New Mexico. With its rulemaking petition, Petitioner simultaneously filed an application and request for waiver proposing Class I-A operation for Station KOB. The Chief of the Broadcast Bureau dismissed these filings by letter rulings. See *Hubbard Broadcasting, Inc.*, 87 F.C.C.2d 988, 991-94 (1981) (Appendix to the Peti-

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tial interference problems and difficult allocation decisions. For a more detailed discussion of the so-called skywave phenomenon see *Loyola University v. FCC*, —— U.S. App. D.C. ——, ——, 670 F.2d 1222, 1224, n.3 (1982).

[5] *Hubbard Broadcasting, Inc. v. FCC*, 184 U.S. App. D.C. 115, 564 F.2d 600 (1977) (without opinion).

[6] Although the Commission directed KOB, in 1976, to modify its facilities "to specify a nighttime directional pattern and theoretical parameters appropriate to the operation of KOB as a Class II-A station," 59 F.C.C.2d at 46, KOB has not, to date, complied with that directive.

[7] 47 C.F.R. § 73.22 (1981).

tion for a Writ of Certiorari[8] at 12a-17a). In affirming that staff action, the Commission noted that "[b]ecause Hubbard seeks an amendment to § 73.22(a) that would only apply to Station KOB, we agree with the Bureau's letter, and ABC's opposition to the applications for review, that the request for waiver of § 73.22(a) and the petition for amendment to § 73.22(a) are functionally equivalent. We therefore regard the applications for review as complaining of one action . . . ." *Id.* at 989, n.2 (Pet. App. at 8a, n.2).

Petitioner sought review of the Commission order, which affirmed the dismissal of its application and rule-making petition, by the United States Court of Appeals for the Eighth Circuit. That court dismissed the appeal on the grounds that the "FCC's denial of Hubbard's 'package' of applications was, as a matter of substance, the exercise by FCC of its 'radio-licensing power' reviewable under Section 402(b)." *Hubbard Broadcasting, Inc. v. FCC*, 684 F.2d 594, 596 (8th Cir. 1982) (Pet. App. at 5a). The court further stated "that to permit Hubbard to split off a part of the 'package' in a transparent attempt to obtain jurisdiction in a forum other than the Court of Appeals for the District of Columbia, which has twice ruled against reclassifying KOB and WABC as directionalized stations on 770 kHz, would frustrate the clear intent of Congress that judicial review of all cases involving FCC's 'radio-licensing power' be limited to the United States Court of Appeals for the District of Columbia." *Id.* at 596-97 (Pet. App. at 5a).

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[8] Hereinafter cited as "Pet. App."

ARGUMENT

Review by This Court Is Not Warranted Since the Case Presented Involves Unique Factual Circumstances Which Have Been Considered by the District of Columbia Circuit Six Times and Which Have Been Before This Court on Two Prior Occasions

As the rules of this Court make clear, "a review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only where there are special and important reasons therefor." Sup. Ct. R. 17.1. The Petitioner fails to advance any significant questions that warrant review by this Court and, under the standard set by Rule 17.1, the subject petition should be denied.

This case presents unique factual circumstances, as more fully detailed above, which have been considered by the Commission and the courts on numerous occasions. Since 1976, in fact, the District of Columbia Circuit has twice considered and rejected essentially the same facts and arguments which are presented here. In light of this excessive judicial scrutiny, review by this Court would serve no purpose besides prolonging the already lengthy history of this case and further delaying KOB's compliance with the Commission's 1976 directive.

Given the unique nature of the underlying facts, this case does not present an appropriate occasion to define the scope of Section 402(b). The "package" of applications filed by Petitioner is unlikely to recur, having been one of a variety of tactics utilized since 1976 to delay construction of the specified facilities and, essentially, to seek reconsideration of the Commission's 1976 decision to classify KOB as a Class II-A station. Indeed, the Commission itself viewed the rulemaking petition and application as "functionally equivalent," noting that the rule change sought by Petitioner would apply only to Stations KOB and WABC. 87 F.C.C.2d at 989, n.2

(Pet. App. at 8a, n.2). On these facts, no "important question of federal law" [9] has been raised meriting review by this Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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December 6, 1982

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[9] Sup. Ct. R. 17.1(c).

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No. 82-772

IN THE

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FEDERAL COMMUNICATIONS COMMISSION
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ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

REPLY TO "MEMORANDUM FOR FEDERAL RESPONDENTS AND BRIEF FOR AMERICAN BROADCASTING COMPANIES, INC. IN OPPOSITION"

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IN THE

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REPLY

THE ISSUE RAISED BEFORE THIS COURT IS UNRELATED TO THE PAST HISTORY OF THE PROCEEDING

In their briefs in opposition, the Federal Respondents and Respondent, American Broadcasting Companies, Inc., seek to confuse the real issue raised in this Court

with the substantive issues presented to the Eighth Circuit but never reached by that court. To this end, the history of the Hubbard/ABC controversy is outlined in considerable detail, and the allegation is made that the issue raised herein would affect only Stations KOB and WABC.

Such an argument is completely erroneous. The important procedural issue in this case was raised for the first time by an untimely motion to dismiss filed by the Federal Communications Commission in the Eighth Circuit. The motion had no relationship to the merits of the KOB/WABC controversy and its resolution is of vital importance to all litigants seeking review under the provisions of Section 402 of the Communications Act of 1934, as amended.

THE ISSUE RAISED HEREIN RESULTS FROM THE CONFUSION CREATED BY CONFLICTING DECISIONS OF THE LOWER COURTS

Petitioner has pointed out the fact that the confusion caused by the lower courts' interpretation of Section 402(a) is depriving United States citizens of the rights guaranteed by Congress. To protect themselves, litigants have time and time again given up their right to appeal to the circuit covering their residence or principal office of business. The fact that many parties have decided to proceed under both Sections 402(a) and 402(b) in the United States Court of Appeals for the District of Columbia demonstrates the confusion created by the conflicting decisions of the lower courts. The Commission, itself, recently withdrew a "Motion to Dismiss" three petitions for review filed in the United States Court of Appeals for the Tenth Circuit. The reason for the change of heart was stated as follows:

> "The Commission's motion [to dismiss] urged dismissal on the basis of a legal argument *on which the agency has not firmly adopted a consistent and uniform position.*" (Emphasis supplied) (See Appendix at 17a).

This confusing and vacillating position was echoed in the instant case by the respondent United States, which did not join in the Commission's jurisdictional argument before the Eighth Circuit.[1]

This Court in 1940 and 1942 attempted to clear up the problems caused by the lower courts' conflicting interpretation of the meaning of Section 402(b) and stated that the provisions of that section should be strictly construed. In 1951, Congress amended the statute seeking to clarify its intent. However, both efforts failed and it is imperative that this Court accept the petition and resolve the matter once and for all.

The continued confusion involving the meaning of Section 402 can best be illustrated by decisions of the United States Court of Appeals for the District of Columbia Circuit. In *Functional Music, Inc. v. FCC*, 274 F.2d 543, 544 (D.C. Cir. 1958), *cert. denied*, 361 U.S. 813 (1959), the court noted that Functional Music proceeded under 402(a) and 402(b) because of doubt as to which method of review was authorized. In holding that Section 402(b) was applicable, the Court stated:

> "Sections 402(a) and 402(b) of the Communications Act, under which these review proceedings have been initiated, are by definition mutually exclusive. The proper delineation of these two

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[1] Respondent United States again takes no position on the jurisdictional issue. (Memorandum for Federal Respondents, page 3, footnote 2.)

provisions has been a source of considerable difficulty to litigants in the past." (Footnotes omitted).

Id. at 547.

In 1963, the same court in *Rhode Island Television Corporation v. FCC*, 320 F.2d 762 (D.C. Cir. 1963), stated:

> "In seeking review under both §§ 402(a) and 402(b) of Communications Act, it would appear appellants acted in an abundance of caution to be certain that review would be available under one or the other of the two sections cited. However, these sections 'are by definition mutually exclusive' paths of judicial review and a given order may not be reviewed in two separate cases."

Id. at 766.

In the *Rhode Island* case both a petition for rulemaking and an application were filed with the Commission as was done in the instant case. Upon denial of both the application and the petition, review was sought under Sections 402(a) and 402(b). Judge Burger, speaking for the court, held that the petition for rulemaking could be reviewed under Section 402(a), stating:[2]

> "The Commission's order of July 31, 1962, in exercise of its licensing functions is reviewable under Section 402(b) of the Act in Case No. 17255. The Commission's order of July 30 denying the petition for rulemaking is reviewable under Section 402(a) of the Act in Case No. 17256." (Footnotes omitted).

Id.

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[2] See also, *Mackey v. United States*, 255 F.2d 898 (D.C. Cir. 1958), where the denial of a petition for rulemaking to amend the table of television assignments to shift Channel 3 from Philadelphia to Atlantic City was reviewed under Section 402(a).

Thus the ruling in the *Rhode Island* case is clearly in conflict with that of the Eighth Circuit which held that Petitioner's filing of both a petition for rulemaking and an application for a construction permit created a "package" of applications reviewable only under Section 402(b).

Respondents also contend that the "package" of applications is unlikely to recur, again basing this allegation on the erroneous argument that the jurisdictional issue is related to the past history of the case. The fact is that the challenged action occurs regularly since most petitions for rulemaking are accompanied by or will be followed by an application. Thus, the error of relating petitions for rulemaking to the applications that will be filed to accomplish the ultimate aim of the rulemaking petition is completely contrary to the intent of Congress. The radio licensing power, which is reviewable under Section 402(b), does not include and was never intended by Congress to include petitions designed to make changes in the Commission's frequency allocation plans.

CONCLUSION

It is submitted that the facts and legal precedent cited in the instant petition demonstrate that the issue raised herein presents an important question of law which requires review by this Court. The issue is ripe for resolution by this Court so that the procedural rights of United States citizens, granted by Congress, will be fully protected.

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

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May 24, 1982

VIA FEDERAL EXPRESS

Robert D. St. Vrain, Clerk
United States Court of Appeals
for the Eighth Circuit
Room 511, U.S. Court and Custom House
St. Louis, Missouri 53101

Re: *Hubbard Broadcasting, Inc. v. Federal Communications Commission*, Case No. 81-2295 (8th Cir., filed November 24, 1981).

Dear Mr. St. Vrain:

On behalf of Hubbard Broadcasting, Inc., petitioner in the above-referenced appeal, and pursuant to *Fed. R. App. P.* 28(j), enclosed are copies of two documents filed by the Federal Communications Commission in a pending appeal in the United States Court of Appeals for the Tenth Circuit, *Springfield Television of Utah, Inc. v. Federal Communications Commission*, Case No. 80-2028 (10th Cir.), which documents Hubbard believes are relevant to the jurisdictional argument raised by the Commission in the instant case. *See Brief for Respondent* at 13-18. The first of these documents is a "Motion to Dismiss," filed May 5, 1981, and the second, a "Consent Motion for Leave to Withdraw 'Motion to Dismiss,'" filed June 19, 1981. Both of these documents recently came to the attention of counsel for Hubbard.

Should any questions arise concerning this matter, please communicate with this office.

Very truly yours,

/s/ Robert L. Pettit

RLP/aw
Enclosure

cc: C. Grey Pash, Esquire
Robert B. Nicholson, Esquire
James A. McKenna, Jr., Esquire
Clarence V. McKee, Esquire

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Springfield Television of Utah, Inc.,
Petitioner,

v.

Federal Communications Commission and United States of America,
Respondents,

Case No. 80-2028

Storer Broadcasting Company,
Petitioner,

v.

Federal Communications Commission and United States of America,
Respondents,

Case No. 81-1475

WIIC-TV Corporation and Cox Broadcasting Corporation,
Petitioners,

v.

Federal Communications Commission and United States of America,
Respondents.

Case No. 81-1370

MOTION TO DISMISS

The Federal Communications Commission respectfully asks the Court to dismiss the captioned petitions for review, filed under section 402(a) of the Communications Act of 1934, 47 U.S.C. § 402(a),[1] for lack of

[1] The text of section 402(a) and (b) is appended hereto as Attachment A.

subject matter jurisdiction. Section 402(b) of that statute, 47 U.S.C. § 402(b), vests exclusive jurisdiction over appeals from FCC radio and television licensing decisions in the United States Court of Appeals for the District of Columbia Circuit. The agency order here challenged is intimately associated with the FCC's radio licensing power and under existing precedent is appealable only to the D.C. Circuit under section 402(b).[2]

BACKGROUND

The FCC allots television stations nationwide according to an allocation scheme established in its Table of Allotments (hereinafter Table).[3] That Table assigns television channels to communities throughout the United States with two main goals in mind: to ensure the most efficient technical use of the limited number of available television channels, and to promote a fair distribution of channels nationwide.[4] The Table is based on a system of minimum mileage separations between stations. These separations, together with limitations on power output and antenna height, reduce interference among stations to acceptable levels.

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[2] Dismissal will not preclude petitioners from obtaining judicial review. A petition for reconsideration of the challenged order is presently pending before the FCC. The parties will have thirty days after the agency gives public notice of its action on that petition to appeal the underlying decision. *See* 47 U.S.C. § 405.

[3] The Table of Allotments is found in Section 73.606 of the Commission's rules. *See* 47 C.F.R. § 73.606. Historically, it has been called the Table of Assignments. The Commission is now referring to it as the Table of Allotments in accord with terminology used in the International Radio Regulations.

[4] The Table was devised in 1952. *Sixth Report and Order*, 41 FCC 148 (1952).

An individual interested in applying for a new television station must do three things: (1) find an allocated but unused channel in the Table or file a petition to amend the Table (i.e. to add a new channel) if one is not available;[5] (2) file an application for a permit to construct the television station in question; and (3) apply for a license to operate the station. Ordinarily, a new VHF channel can be added to the Table of Allotments only if it conforms to the mileage separation requirements specified in the FCC's rules.[6] If the channel sought is closer to an allocated channel than the rules permit, the FCC would have to grant a waiver of the rules.

For some time, parties have asked the FCC to waive the mileage separation rules to allow operation of "VHF drop-ins" in selected cities.[7] (A VHF drop-in is a new, short-spaced very high frequency television channel.) The September 9, 1980 order being appealed here waived minimum mileage separation rules and authorized VHF drop-ins in four cities.[8] The effect of the order was

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[5] Parties interested in operating short-spaced VHF television stations in Johnstown, Pennsylvania and Knoxville, Tennessee took this first step some time ago by filing petitions to amend the Table of Allotments so as to add channels in those cities. The FCC consolidated those petitions with the proceeding at issue in this case. *See* note 8, *infra*, 63 FCC 2d at 843-44.

[6] Standard mileage separations are set forth in 47 C.F.R. § 73.610.

[7] *See Petition for Rulemaking to Amend Television Table of Assignments to Add New VHF Stations in the Top 100 Markets*, 52 FCC 2d 618 (1975) (Notice of Inquiry).

[8] *See VHF Television Top 100 Markets*, 81 FCC 2d 233 (1980), *petitions for recon. pending*. The underlying Notice of Proposed Rulemaking was issued in 1977. *See Petition for Rulemaking to Amend Television Table of Assignments to Add New VHF Stations in the Top 100 Markets*, 63 FCC 2d 840 (1977).

to allow parties to apply for new television stations in Charleston, West Virginia, Johnstown, Pennsylvania, Salt Lake City, Utah and Knoxville, Tennessee. If that order is judicially affirmed, the FCC can proceed to grant applications for construction permits to build—and ultimately licenses to operate—television stations on these four newly assigned frequencies. Both practically and legally, then, the order being challenged here is inextricably bound up with the process by which short-spaced television stations can be licensed in these four cities.

After the FCC adopted its September 9 order, Springfield Television of Utah, Inc. filed a petition for review with this Court; Storer Broadcasting Co. filed a petition to review the same order in the Sixth Circuit; and a similar petition was lodged in the Third Circuit by WIIC-TV Corp. The latter two cases have since been transferred to this Circuit.

ARGUMENT

Sections 402(a) and (b) of the Communications Act establish two paths for judicial review of Commission orders. Section 402(b) provides that review of orders in eight enumerated situations—all involving the FCC's licensing powers—may be had only in the D.C. Circuit. Section 402(a), a "residual" provision,[9] authorizes review of any order not within section 402(b) in the D.C. Circuit or the circuit in which the petitioner "resides or has its principal office."[10] The two sections are "mutually exclusive;"[11] therefore, this Court has juris-

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[9] *See WHDH, Inc. v. FCC*, 457 F.2d 559, 560 (1st Cir. 1972).

[10] 28 U.S.C. § 2345. Petitions for review under section 402(a) are governed by the requirements of 28 U.S.C. §§ 2341-49.

[11] *See, e.g., Rhode Island Television Corp. v. FCC*, 320 F.2d 762, 766 (D.C. Cir. 1963).

diction in this case "only if § 402(b) does *not* apply, such matters having been exclusively assigned to the Court of Appeals for the District of Columbia Circuit."[12]

The FCC submits that this case is within the ambit of section 402(b), and that the D.C. Circuit alone has jurisdiction to entertain an appeal from the order which allocated one additional, short-spaced VHF station to each of four cities. Both the legislative history and judicial precedent construing section 402(b) support that view.

Until 1952, jurisdiction to review five types of orders was vested exclusively in the D.C. Circuit under 402(b): orders granting or denying applications for radio station construction permits, licenses, license renewals, license modifications, and orders suspending radio operator licenses.[13] After repeated litigation over the scope and meaning of section 402[14] and several years of congressional attempts to revise it, Congress amended the

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[12] *WHDH, Inc. v. FCC, supra,* 457 F.2d at 560-61 (emphasis in original).

[13] *See* Communications Act of 1934, Ch. 652, § 402, 48 Stat. 1093 (1934), as amended May 20, 1937, Ch. 229, §§ 11-13, 50 Stat. 197.

[14] *See, e.g., Federal Communications Commission v. Columbia Broadcasting System of California, Inc.,* 311 U.S. 132 (1940). The Senate Report explained:

> Under present law, confusion and controversy have arisen concerning what decisions and orders of the Commission might become . . . subject to judicial review and in what court. This has been carried to the point where the time and effort of both litigants and courts have been too much taken up with jurisdictional problems rather than with the merits of particular cases. Enactment of this subsection is designed to obviate this difficulty.

S. Rep. No. 44, 82nd Cong., 1st Sess. 11 (1951).

section in 1952, broadening the range of orders appealable thereunder. It is evident from the legislative history that section 402(b) was amended to

> make clear that judicial review of all cases involving the exercise of the Commission's radio-licensing power is limited to [the D.C. Circuit].[15]

Consistent with this legislative purpose, the courts have not woodenly restricted 402(b) appeals to the enumerated categories of cases. Instead, they have required orders to be appealed under that section which bear "close functional similarity" to orders specifically appealable under 402(b),[16] or which are "ancillary" to,[17] "in aid of",[18] or "intimately associated with"[19] the

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[15] S. Rep. No. 44, 82nd Cong., 1st Sess. 11 (1951). Senator White, co-sponsor of an earlier bill that served as the basis of the 1952 amendment to section 402(b) stated:

> [P]aragraph (a) of this section as it now stands relates to those orders of the Commission entered in matters involving common carriers and certain other orders relating to radio broadcast stations not now appealable to the [D.C. Circuit] under paragraph (b) of section 402. Under the proposed amendment, all orders entered by the Commission in the performance of its licensing functions would be appealable under paragraph (b) . . .

89 Cong. Rec. 1469, 1471 (Mar. 2, 1943) (remarks of Senator White on S. 814). *Accord* S. Rep. No. 1567, 80th Cong., 2nd Sess. 19 (1948); S. Rep. No. 741, 81st Cong., 1st Sess. 15 (1949).

[16] *Metropolitan Television Co. v. United States*, 221 F.2d 879, 880 (D.C. Cir. 1955) (order denying protest to grant of competitor's application to change frequency and power of broadcast station).

[17] *Helena TV, Inc. v. FCC*, 269 F.2d 30 (9th Cir. 1959); *Tomah-Mauston Broadcasting Co. v. FCC*, 306 F.2d 811, 812 (D.C. Cir. 1962) (order denying petition to stay or revoke construction permit).

[18] *Cook, Inc. v. United States*, 394 F.2d 84, 87 (7th Cir. 1968) (order returning radio license applications as late filed).

[19] *WHDH, Inc. v. United States*, 457 F.2d 559, 561 (1st Cir. 1972) (order granting program test authority).

exercise of the FCC's licensing power. In resolving jurisdictional questions, courts have looked to "the substance of what the Commission has purported to do and has done." *Columbia Broadcasting System v. United States*, 316 U.S. 407, 416 (1942).

The FCC's order in this case was the first of three principal steps to licensing new VHF stations in four specific cities—Knoxville, Johnstown, Salt Lake City and Charleston. The waivers lifted an otherwise insurmountable barrier to broadcast operation, making it possible for parties to file construction permit applications. In fact, several applications have been filed since the order's release, and others are on their way. Without question, this Commission order is "ancillary" to, and "intimately associated with" the FCC's licensing power.[20]

The fact that the FCC's action was accomplished by rulemaking does not require a contrary result. Petitions which ask for amendment of the Table of Allotments are considered in a rulemaking context because the Table has been incorporated into the FCC's rules. (5 U.S.C. § 553 requires most rule changes to be made by rulemaking.) In reality, such petitions are more nearly analogous to a licensing proceeding, since they typically affect a limited number of parties—often only one. AM channel assignments, for example, are made in individual adjudications rather than by rulemaking.[21]

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[20] The practical import of the FCC's action is amply illustrated by these three lawsuits by existing television licensees, which maintain they will be economically or otherwise injured by the FCC's authorization of an additional VHF television station in the vicinity of their operation. *See* Springfield Television Docketing Statement at ¶ 1; WIIC-TV Corp. Petition for Review at 3; Storer Broadcasting Co. Petition for Review at 2. *Cf. Metropolitan Television Co. v. United States, supra* note 16.

[21] That is so because the AM allotment scheme, unlike FM and television, is not spelled out in the FCC's rules.

Previous case law lends support to the FCC's position. For example, in *Kessler v. FCC*, the court decided that an FCC order establishing a freeze on the filing of certain AM license applications—which resulted in the return of appellants' applications—effectively denied those applications, and thus judicial review of the FCC's actions was proper only under section 402(b).[22] And in *Cook, Inc. v. United States, supra*, the court dismissed the petitioner's challenge to an FCC order setting a cut-off for the filing of certain applications, finding the Commission's refusal to consider petitioner's late-filed applications to be "in aid of and within the exercise of the Commission's licensing power,"[23]—even though the specific order challenged was not listed in section 402(b). The critical fact in both *Kessler* and *Cook* was that the action challenged regulated the appellants' ability to file license applications.[24] Like the orders in *Kessler* and *Cook*, the order petitioners would have this court review is "ancillary to" and "intimately associated with" the FCC's radio-licensing powers, and is not appealable under section 402(a).[25]

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[22] 326 F.2d 673, 679 and n.4 (D.C. Cir. 1963).

[23] 394 F.2d at 87.

[24] In this case, applicants in the four cities would be unable to apply for construction permits and licenses but for the new allocations. As we have pointed out, petitions for allocations in Johnstown and Knoxville, filed as the first step toward licensing in those cities, provided part of the impetus for the proceeding that led to the FCC's allocation decision. *See* note 5, *supra*.

[25] The fact that the parties in *Kessler* and *Cook* submitted applications to the Commission cannot provide any meaningful distinction between those cases and the instant appeal. Otherwise parties could create 402(b) jurisdiction to review an FCC order simply by filing an application in violation of the order. We respectfully submit that Congress intended the nature of the agency's action, not the context in which it occurs, to be dispositive.

CONCLUSION

This court should dismiss these three petitions for review for lack of jurisdiction under section 402(a). Dismissal will not deprive petitioners of an opportunity for judicial review. *See* note 2 *supra*.

Respectfully submitted,

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May 5, 1981

ATTACHMENT A

PROCEEDINGS TO ENJOIN, SET ASIDE, ANNUL, OR SUSPEND ORDERS OF THE COMMISSION

SEC. 402. (a) Any proceeding to enjoin, set aside, annul, or suspend any order of the Commission under this Act (except those appealable under subsection (b) of this section) shall be brought as provided by and in the manner prescribed in Public Law 901, Eighty-first Congress, approved December 29, 1950.

(b) Appeals may be taken from decisions and orders of the Commission to the United States Court of Appeals

for the District of Columbia in any of the following cases:

(1) By any applicant for a construction permit or station license, whose application is denied by the Commission.

(2) By any applicant for the renewal or modification of any such instrument of authorization whose application is denied by the Commission.

(3) By any party to an application for authority to transfer, assign, or dispose of any such instrument of authorization, or any rights thereunder, whose application is denied by the Commission.

(4) By any applicant for the permit required by section 325 of this Act whose application has been denied by the Commission, or by any permittee under said section whose permit has been revoked by the Commission.

(5) By the holder of any construction permit or station license which has been modified or revoked by the Commission.

(6) By any other person who is aggrieved or whose interests are adversely affected by any order of the Commission granting or denying any application described in paragraphs (1), (2), (3), and (4) hereof.

(7) By any person upon whom an order to cease and desist has been served under section 312 of this Act.

(8) By any radio operator whose license has been suspended by the Commission.

CERTIFICATE OF SERVICE

I, Lorraine J. Thomas, hereby certify that the foregoing "Motion to Dismiss" was served this 5th day of

May, 1981, by mailing true copies thereof, postage pre-paid, to the following persons at the addresses below:

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/s/ Lorraine J. Thomas

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Springfield Television of Utah, Inc., *Petitioner,* *v.* ***Federal Communications Commission and United States of America,*** *Respondents,*	**Case No. 80-2028**
Storer Broadcasting Company, *Petitioner,* *v.* ***Federal Communications Commission and United States of America,*** *Respondents,*	**Case No. 81-1475**
WIIC-TV Corporation and Cox Broadcasting Corporation, *Petitioners,* *v.* ***Federal Communications Commission and United States of America,*** *Respondents.*	**Case No. 81-1370**

CONSENT MOTION FOR LEAVE TO WITHDRAW "MOTION TO DISMISS"

The Federal Communications Commission respectfully asks the Court's leave to withdraw its "Motion to

Dismiss" the captioned petitions for review. The Commission's motion urged dismissal on the basis of a legal argument on which the agency has not firmly adopted a consistent and uniform position. For that reason, we respectfully urge the Court not to rule on the motion but to permit the Commission to withdraw it. We regret any inconvenience our motion may have caused the Court and counsel for other parties. Counsel for petitioners in all three captioned cases consent to withdrawal of motion to dismiss.

Respectfully submitted,

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